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VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 76

JAMES GALLICK, PETITIONER,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO, CUYAHOGA COUNTY

PETITION FOR CERTIORARI FILED MARCH 3, 1962
CERTIORARI GRANTED APRIL 16, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE COURT OF COMMON PLEAS IN AND FOR COUNTY OF CUYAHOGA, STATE OF OHIO

No. 697,202.

JAMES GALLICK, Plaintiff,

vs.

THE BALTIMORE AND OHIO RAILROAD CO., Defendant.

AMENDED PETITION—Filed September 8, 1958

Now comes the plaintiff and after having duly obtained leave of court files this his amended petition. Plaintiff for his cause of action says that at all times herein alleged the defendant was and is a railroad corporation, organized and existing under the laws of the State of Maryland, and was at the time of the occurrence herein set forth and is now carrying on its business as an interstate common [fol. B] carrier of passengers and freight within the jurisdiction of this court; that at all times herein alleged, plaintiff was and is a resident of the City of Parma, County of Cuyahoga and State of Ohio, employed by the defendant as a Yard Foreman, in which capacity the plaintiff was engaged in the movement, switching and classification of freight cars on tracks of the defendant located in the vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, County of Cuyahoga, State of Ohio; that the action of plaintiff is brought under, and is governed by the provisions of the Federal Employers' Liability Act, 45 USCA, Sections 51-59 and Amendments thereto; that the work duties of the plaintiff at all times herein alleged substantially affected and were in furtherance of interstate commerce.

Plaintiff further says that in the month of August, 1954, the exact date and time being uncertain, he was engaged

in the performance of his duties involving the movement, switching and classification of railroad freight cars at defendant's tracks located in vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, County of Cuyahoga, State of Ohio; that in close proximity to said tracks in August of 1954, and for a long time prior thereto to the knowledge of the defendant, there existed a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs, lice and vermin; that plaintiff was required to perform his work duties in close proximity to said area; that in the month of August, 1954, while performing his usual and customary work duties in and about the Columbus Road Bridge and Lime Road tracks of defendant, the plaintiff was bitten by [fol. C] an insect following which he developed serious, painful and disabling injuries as will be described hereinafter.

Plaintiff further says that the defendant was negligent in the following respects:

1. In that it required plaintiff to perform his work duties in close proximity to an area which was known by the defendant to be infested with dead pigeons, rats, bugs, lice and vermin.

2. In that it failed to drain said stagnant pool of water which would have eliminated the hazard to the health of the employees compelled to work in the vicinity of said area and more particularly, this plaintiff.

3. In that it failed by the use of chemicals or otherwise to eliminate from the said area where plaintiff was required to work the accumulations of dead pigeons, rats, bugs, lice and vermin, although it knew of said condition which existed for many years prior to the injury to plaintiff.

4. In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties.

5. In that it failed to inspect and spray the empty freight cars being moved, switched or classified in the

vicinity on the track of the defendant near Lime Road and the Columbus Road Bridge to rid the same of insects, bugs, lice and vermin.

6. In that it knew that by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs, and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions.

Plaintiff further says that by means of and in consequence of the foregoing negligent acts and omissions of [fol. D] the defendant, and as the direct and proximate result thereof, he was caused to be bitten by an insect which caused his system to become poisoned and which resulted in the formation of deep, acute ulcerations with draining about his extremities and body, which condition has not abated with time.

Plaintiff further says that as a result of his injuries, it had been necessary for him to undergo extensive hospitalization, medical care and attention, and surgery, for all of which he has sustained expense, the full extent and amount of which is, as yet, unascertainable inasmuch as plaintiff is receiving medical care and attention and hospitalization at the time of filing this, his amended petition.

Plaintiff further says that his injuries have necessitated surgery for the amputation of both legs, that he is confined to his hospital bed and a wheel chair and will remain so into the indefinite future.

Plaintiff further says that his injuries have caused him to suffer an extreme weight loss and necessitated that he consume large quantities of narcotics in an attempt to relieve his pain.

Plaintiff further says that as a result of his injuries, he has suffered and will suffer permanently from pain, great mental anguish, extreme nervousness, an inability to obtain normal rest, weight loss, cosmetic disfigurement, an inability to get about, and extreme worry, grief and anxiety.

Plaintiff further says that his injuries have rendered him an invalid and that he needs constant care and attention to his person.

Plaintiff further says that prior to the foregoing occurrence, he was regularly employed, earning and capable [fol. E] of earning substantial wages but that as a result of his injuries, as aforesaid, he has been rendered totally incapacitated from resuming his railroad occupation or any other gainful occupation which condition will continue into the indefinite future.

By means of and in consequence of which plaintiff has been injured and damaged in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

Wherefore, plaintiff prays judgment from the defendant herein in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

A. H. Dudnik, Meyer A. Cook, Attorneys for Plaintiff.

IN THE COURT OF COMMON PLEAS

ANSWER TO AMENDED PETITION—Filed December 17, 1958

First Defense.

Now comes defendant and for its first separate defense to plaintiff's amended petition admits that it is a railroad corporation organized and existing under the laws of the State of Maryland, and maintains certain tracks in the vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, Ohio; admits that during the month of August, 1954, plaintiff was employed by defendant in the capacities of yard foreman and yard helper, engaged in the movement, switching, and classification of freight cars over certain tracks of defendant located in the City of Cleveland; admits that plaintiff's cause of action is brought [fol. F] under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. §§ 51-59, as amended; and admits that plaintiff's duties as yard foreman and yard helper were in furtherance of interstate commerce.

Not intending to deny that plaintiff may have been required in the course of his duties as yard foreman or yard helper to be present from time to time during the month of August, 1954, at or near the tracks of defendant which

are located in the vicinity of Lime Road and the Columbus Road Bridge, or that plaintiff has suffered from a serious and painful disability subsequent to August, 1954, plaintiff does deny for lack of knowledge that there existed at that time a pool of stagnant water or other unsanitary condition for which the defendant was responsible in the vicinity of its tracks at Lime Road and the Columbus Road Bridge; denies that plaintiff's illness or disease was proximately caused or contributed to by the negligence of this defendant, its agents, servants, or employees, either in the respects alleged in the amended petition or in any other manner, and specifically denies the existence of any connection whatsoever between the condition of defendant's tracks and roadbed and the insect bite allegedly sustained by plaintiff while employed as a yard foreman or yard helper for defendant during the month of August, 1954.

Further answering, defendant says that if it be true that the illness or disease from which plaintiff now suffers was caused or contributed to by an insect bite sustained by him on defendant's premises or elsewhere, the likelihood of harm and consequences to plaintiff therefrom [fol. 6] were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose requiring the exercise of care by defendant to protect plaintiff from any such risk; and defendant further says that if it should be found that such risk should have been foreseen by this defendant, no reasonable method or means was available to it which could have eliminated, controlled, or appreciably reduced the numbers or types of insects in and about its premises.

Further answering, defendant denies each and every allegation contained in plaintiff's amended petition save and except those hereinabove expressly admitted to be true.

Second Defense.

For its second separate defense to plaintiff's amended petition, defendant incorporates herein by reference and makes a part hereof the preceding portions of this its answer and says that if it should be found that plaintiff's disability was caused in whole or in part by the negligence

of this defendant, which defendant specifically denies, then neither said disability nor the insect bite which is claimed to have occasioned it constitutes an "injury" within the meaning of the Federal Employers' Liability Act, and that plaintiff may not recover in this action.

Wherefore, having fully answered, defendant prays that plaintiff's amended petition be dismissed and that it may go hence with its costs without day.

Baker, Hostetler & Patterson, Attorneys for Defendant.

[fol. H]

IN THE COURT OF COMMON PLEAS

REPLY—Filed June 16, 1959

For his Reply to the Answer of the defendant to plaintiff's Amended Petition, plaintiff denies each and every fact, statement and allegation contained therein save and except such as are an admission of a fact, statement or allegation contained in the Amended Petition of Plaintiff.

For his further Reply plaintiff re-alleges and re-avers the facts, statements and allegations contained in his Amended Petition, and prays for judgment as in his Amended Petition he has prayed.

A. H. Dudnik, Attorney for Plaintiff.

IN THE COURT OF COMMON PLEAS

JOURNAL ENTRY OF JUDGMENT—July 20, 1959

The Court finds that the jury in the within cause was duly impanelled and sworn; that proper request was made to the Court by the defendant for a special verdict as provided by law; and that a special verdict was returned by the jury.

The Court further finds that the photographic copies annexed hereto as Exhibits "A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W" are an exact repro-
[fol. I] duction of the original special verdict returned by

the jury and made a part of the record of the within case; and that said Exhibits annexed hereto as Exhibits A through W constitute the verdict of the jury."

The Court being fully satisfied that Exhibits A through W annexed hereto constitute the verdict of the jury, the Court hereby incorporates the same by reference as part of this Journal Entry as though expressly rewritten herein.

The Court further finds that proper request was made by the defendant for the submission of a separate finding of fact by the jury and that Exhibit "X" annexed hereto is an exact photographic copy of the finding of fact of the jury. The Court therefore incorporates Exhibit "X" as annexed hereto as a part of this Journal Entry as though expressly rewritten herein.

The Court being of the opinion that the special verdict of the jury as referred to and incorporated within this Journal Entry and annexed hereto as Exhibits A through W is sufficient in law to require a judgment for the plaintiff; and the jury by said special verdict having found that plaintiff's damages are Six Hundred Twenty Five Thousand Dollars ($625,000.00); and the Court being of the opinion that the finding of fact of the jury, as referred to and incorporated within this Journal Entry and annexed hereto as Exhibit "X" is consistent with the verdict of the jury; it is hereby ordered that plaintiff recover of the defendant the said sum of Six Hundred Twenty Five Thousand Dollars ($625,000.00), for which sum, with the costs of this action, judgment is hereby rendered in favor of plaintiff and against the defendant."

[fol. J] SPECIAL VERDICT.

Exhibit A.

We, the jury, being first duly impanelled and sworn and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence, the following determinative issues in this cause:

1. Did a pool of stagnant water exist under the Columbus Road Bridge during the entire early part of August, 1954? Yes.

(Names of twelve jurors omitted.)

Exhibit B.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

2. Was the pool of stagnant water on the premises of the defendant B. & O.? Yes.

(Names of twelve jurors omitted.)

Exhibit C

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

3. If the answer to 2 is yes, was the defendant B. & O., in possession of the premises under the Columbus Road Bridge whereon the stagnant water stood? Yes.

(Names of twelve jurors omitted.)

[fol. K] Exhibit D

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

4. Did the defendant B. & O. have under its control the premises under the Columbus Road Bridge wherein the stagnant water stood? Yes.

(Names of twelve jurors omitted.)

Exhibit E

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

5. If the answer to question No. 2 is yes, did dead pigeons accumulate under the bridge in the stagnant water? Yes.

(Names of ten jurors omitted.)

Exhibit F.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

6. If the answer to No. 2 is yes, did dead rats accumulate under the bridge in the stagnant water? Yes.

(Names of nine jurors omitted.)

[fol. L] Exhibit G.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

7. If the answer to No. 2 is yes, did vermin accumulate under the bridge in the stagnant water? Yes.

(Names of twelve jurors omitted.)

Exhibit H.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

8. If the answer to No. 2 is yes, did bugs accumulate under the bridge in the stagnant water? Yes.

(Names of twelve jurors omitted.)

Exhibit I.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number

thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

9. Was plaintiff required to perform his work duties in close proximity to the area referred to in question No. 1? Yes.

(Names of twelve jurors omitted.)

[fol. M] Exhibit J

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

10. On approximately August 10, 1954, was plaintiff bitten by an insect? Yes.

(Names of twelve jurors omitted.)

Exhibit K

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

11. If the answer to Question No. 10 is yes, was he bitten while performing his usual and customary work duties? Yes.

(Names of twelve jurors omitted.)

Exhibit L

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

12. If the answer to No. 10 is yes, was he bitten near or about the Columbus Road Bridge? Yes.

(Names of twelve jurors omitted.)

[fol. N] Exhibit M

We, the jury, being first duly impaneled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

13. Did the defendant B. & O., provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?

Jury can't decide on this question.

Exhibit N

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

14. If the answer to question 1 is yes, did the defendant B. & O. know that by permitting the accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs and vermin would be attracted to said area? Yes.

(Names of ten jurors omitted.)

Exhibit O

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

15. If the answer to 14 is yes, did the defendant B. & O., know that its employees would have to work in this area? Yes.

(Names of ten jurors omitted.)

[fol. O] Exhibit P

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

16. Was the defendant negligent in one or more of the particulars alleged in the petition? Yes.

(Names of twelve jurors omitted.)

Exhibit Q.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

17. If the answer to Question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence.

There existed a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs and vermin.

(Names of ten jurors omitted.)

Exhibit R

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

18. Was the illness or disease from which Mr. Gallick now suffers caused in whole or in part by an insect [fol. P] bite sustained by him on defendant B. & O.'s premises? Yes.

(Names of twelve jurors omitted.)

Exhibit S.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

19. Were the injuries to the plaintiff proximately caused in any part, even the slightest, by any one or more of the acts or omissions of the defendant? Yes.

(Names of twelve jurors omitted.)

Exhibit T.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

20. If the answers to any one of the questions numbered 1, 5, 6, 7, and 8, is yes, was there any reason for the defendant B. & O., to anticipate that such would or might probably result in a mishap or an injury? No.

(Names of ten jurors omitted.)

Exhibit U.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

[fol. Q] 21. Was there a proximate causal relationship to the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? Yes.

(Names of twelve jurors omitted.)

Exhibit V.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? No.

(Names of twelve jurors omitted.),

Exhibit W.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number

thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

23. What amount of money will compensate the plaintiff, James T. Gallick, for his injuries and damages, if any, resulting proximately from this accident?

$625,000.00.

(Names of twelve jurors omitted.)

Exhibit X.

Interrogatories.

5(a) Where on plaintiff's body was his first skin infection?

Answer: Back of left leg approximately 4" above knee—more to the outside.

(Names of twelve jurors omitted.)

[fol. S]

IN THE COURT OF COMMON PLEAS

No. 697202

[Title omitted]

JOURNAL ENTRY—July 16, 1959

Defendants motion for judgment on special verdict. Overruled.

Victor Cohen, Judge.

[fol. T]

IN THE COURT OF COMMON PLEAS

No. 697202

[Title omitted]

JOURNAL ENTRY—September 29, 1959

Motion for judgment notwithstanding the verdict. Overruled.

Victor Cohen, Judge.

[fol. U]

IN THE COURT OF COMMON PLEAS

No. 697202

[Title omitted]

JOURNAL ENTRY — September 29, 1959

Defendant, Baltimore and Ohio Railroad motion for a new trial is hereby overruled. No record.

Victor Cohen, Judge.

[fol. 1]

The State of Ohio,)
) ss.:
County of Cuyahoga)

IN THE COURT OF COMMON PLEAS

No. 697,202

JAMES T. GALLICK, Plaintiff,

—vs.—

BALTIMORE & OHIO RAILROAD CO., Defendant.

DEFENDANT'S BILL OF EXCEPTIONS

APPEARANCES:

On behalf of the Plaintiff: A. H. Dudnik, Esq., Marshall L. Nurenberg, Esq.

On behalf of the Defendant: Baker, Hostetler & Patterson by Russell E. Leasure, Esq. and Alexander H. Hadden, Esq.

Alfonso Romito, Official Court Reporter, Cuyahoga County, Ohio.

[fol. 22] Thursday morning session, 9:15 A.M., June 11, 1959.

Plaintiff's Case

The Court: The Plaintiff may call his first witness.

Mr. Dudnik: Will you call William Molnar? If your Honor please, the Plaintiff calls Mr. Molnar for cross-examination under the statute.

Mr. Leasure: If your Honor please, the Defendant should like at this time to interpose an objection to any cross-examination until it has been established, until the foundation has been laid under the statute which we have discussed.

The Court: I ass me that counsel for the Plaintiff will establish the foundation.

You may proceed.

[fol. 23] Thereupon, the Plaintiff, to maintain the issues on his part to be maintained, called as a witness WILLIAM MOLNAR, who, being first duly sworn, was examined and testified as follows:

Direct examination of William Molnar.

By Mr. Dudnik:

Q. Mr. Molnar, I want you to speak loudly and clearly enough so that all of these folks can hear you. Will you state your name, please?

A. William Molnar.

Q. And where do you live, Mr. Molnar?

A. 7102 Elton.

Q. E-l-t-o-n?

A. Yes.

Q. Are you a family man, sir?

A. Yes, sir.

Q. Where do you work?

A. B & O Railroad.

Q. How long have you worked for the B & O Railroad?

A. It will be 14 years in August.

Q. And in what capacity do you work there?

A. As a brakeman.

Q. Is that also sometimes known as switchman?

A. Yes, sir.

[fol. 24] Q. Mr. Molnar, in August of 1954 were you working for the B & O Railroad?

A. Yes, sir.

Q. As a switchman?

A. Yes.

Q. In the month of August of 1954 what job were you working?

A. I was working 230 Seneca Street job.

Q. 230 Seneca Street job?

A. Yes.

Q. How long had you worked up to that time?

A. I had been on and off it for several years.

Q. On and off the job for several years. Now, will you explain to this jury and the Court what the 230 Seneca Street job is?

A. Well, you are switching the freight house and all the firms on the west side of the river.

Q. How is that done, briefly, Mr. Molnar?

A. Well, when the freight house is closed at night, you take the loads and empties out. Take the loads out, classify them, and then put the empties in for the next morning shift to load them up.

Q. Now, this particular Seneca job, this 230 Seneca job, does that involve the area around the flats and around the Cuyahoga River?

A. All the way down.

[fol. 25] Q. Beg pardon?

A. All the way down.

Q. Are you familiar with the Columbus Road bridge?

A. We go under it every day.

Q. You go under it every day on the 230 Seneca job?

A. Yes, sir.

Q. Mr. Molnar, when you say you go under it, do you sometimes ride under it?

A. Well, you are always riding on the engine.

Q. And have you ever walked under it?

A. Oh, yes, I have walked under it.

Q. And is that many times?

A. Well, when they tie the train up you have to walk under it.

Q. In other words, is it fair to state that in the course of your work, and in the course of doing your work on the 230 Seneca job, you have occasion often to ride and walk under the Columbus Road bridge?

A. Yes.

Q. Do you know Jim Gallick, Mr. Molnar?

A. Yes, sir.

Q. How long have you known him?

A. Well, from the time, from 1945 when I hired out.

Q. And had you worked the Seneca job with him?

A. Yes, sir.

[fol. 26] Q. On many occasions?

A. Well, he was on the job just prior to this accident.

Q. Were you working that job prior to the accident, too?

A. Yes, sir.

Q. By the way, can you tell us whether there are any men doing the type of work you are doing for the Baltimore and Ohio Railroad that are seventy years old or older?

A. Yes, sir. I don't know just exactly their age. I know they are up there quite a bit.

Q. And do you know that they are in their seventies?

A. I imagine he is, because I have heard it, it is just rumor. I wouldn't swear to his birthday.

Mr. Hadden: Your Honor, objection.

The Court: Sustained. "Just rumors" will go out.

Q. What you imagine and what is rumor we can't talk about. Now, do you know whether there are men working on that job that are about seventy years old?

A. I imagine he is about seventy.

The Court: The last answer will go out, and the jury will disregard it.

Q. You say you imagine, that isn't proper, but that is all right. Now, what kind of a worker was Jim Gallick before he had his accident?

A. Well, he was a hustler.

[fol. 27] Q. What do you mean by a hustler?

A. Well, hurry up and get our work done. Not go real slow.

Q. Was he a good worker?

A. Good worker.

Q. Was he a steady worker as far as you know?

A. Yes, sir.

Q. Mr. Molnar, this switching job on the Seneca Street job is the switching crew composed of four men?

A. Well, at that time I think there was only three.

Q. What would they be, all brakemen or switchmen?

A. Well, there was one conductor and two brakemen.

Q. Who gets the title of conductor?

A. The foreman. In the yard there they are known as foreman, on the road they are known as a conductor.

Q. And is the oldest switchman on that job, does he get the job of conductor, or foreman?

A. If he bids it in.

Q. If he bids it in, if he asks for it?

A. But if there is no one else, then the oldest man gets it.

Q. And besides the three brakemen that you had at that time, was there an engineer and a fireman who were part of it?

A. Yes, standard crew.

Q. So the standard crew was either five or six men, is that correct, sir?

A. Yes, sir.

[fol. 28] Mr. Dudnik: Your Honor, at this time I call Mr. Molnar for cross-examination under the statute.

Mr. Hadden: Your Honor, I should still like to register the same objection.

The Court: Objection overruled.

Mr. Hadden: Your Honor, may I be heard on that point?

The Court: Yes, you may.

OBJECTION TO CALLING MR. MOLNAR FOR CROSS-EXAMINATION BY MR. DUDNIK AND PROCEEDINGS THEREON AND OBJECTION OVERRULED

(Thereupon the following proceedings occurred at the Court's bench, outside the hearing of the jury, as follows:)

Mr. Hadden: Under the statute which you so kindly found for me this morning, Section 2317.52, as I read that

statute it permits the calling of an employee witness upon cross-examination only when it is established or admitted that the Defendant acted in whole or in part through the agent or employee in connection with the transaction on which he is called to testify.

Now, I do not think that has been established here. It has merely been shown that he is a company employee. This man is going to be cross-examined I presume on the conditions under the bridge.

He had no responsibility on that whatsoever. He was [fol. 29] merely a train employee.

If Mr. Dudnik wants to call him on some other subject matter, he certainly may.

The Court: Well, as I understand it, he has testified that a good part or some of his work at least takes him in that area under the Columbus Road bridge, and that he is a brakeman, and that he worked in the crew that Mr. Gallick worked in, and I think all that counsel for plaintiff will have to show is that this witness in the scope of his employment did a similar type of work that the plaintiff did.

That is the way I read it, but I may be wrong—

Mr. Dudnik: There isn't any question about it, your Honor. He is part of the entire transaction. He is part of the operation of the railroad. He is part of the case.

Mr. Hadden: He has nothing to do with the accident.

Mr. Leasure: In our opinion, Judge, the statute I think very clearly contemplates that the employee or agent shall be cross-examined only where he has played a part in the accident or other event that is the subject of a lawsuit.

That has not been established here at all, and I don't [fol. 30] think will be established in the case of this witness.

The typical example being a truck driver who is engaged in an accident which leads to a lawsuit. He can be called for cross-examination because the employer acted through him in the transaction that led to the lawsuit.

The Court: I don't read it that way, but let's read the Section:

"When the action or proceeding relates to a transaction or occurrence in which it has been shown or it is admitted that the adverse party acted either in whole or in part

through an agent or employee." I think there is no question about that, is there?

Mr. Leasure: He is an employee, but it relates to an occurrence, a particular occurrence.

Mr. Dudnik: It does not.

The Court: I am going to get to that. "Such agent or employee of the adverse party may be called"—he is an agent of the adverse party—

Mr. Leasure: But he is not such agent. He is not such agent.

[fol. 31] Mr. Hadden: He is not an agent through whom the B & O acted in connection with this transaction.

Mr. Leasure: Or occurrence.

The Court: I haven't come to that part yet.

Mr. Leasure: Go ahead. I didn't want to interrupt.

The Court: I will start reading from the beginning again:

"When the action or proceeding relates to a transaction or occurrence in which it has been shown or it is admitted that the adverse party acted either in whole or in part through an agent or employee, such agent or employee of the adverse party may be called as a witness and examined as if under cross-examination upon any matters at issue between the parties which are shown or admitted to have been within the scope of such agent's or employee's authority or employment.

"The party calling for such examination shall not thereby be concluded but may rebut such agent's or employee's testimony by counter-testimony.

"The party whose agent or employee is called as a witness by the adverse party and whose agent or employee is [fol. 32] examined as if under cross-examination shall not thereby be concluded but may rebut such agent's or employee's testimony by counter-testimony."

Now, you may rebut this testimony.

Mr. Leasure: We are not arguing about the latter part of this section, but it is the first paragraph.

The Court: I don't think there is any question in my mind that he may testify.

Mr. Leasure: On cross-examination?

The Court: Yes.

Mr. Leasure: Even though there is no showing that the employer acted through this man in the occurrence that is the subject of this lawsuit?

The Court: I don't think it says that here.

Mr. Leasure: Then much of the language is meaningless.

Mr. Dudnik: There isn't any question but what this man can testify. He is an employee. He is a part of this entire transaction. He is a part of the whole operation.

The Court: That is the way I read it, gentlemen. The objection will be overruled.

(Thereupon proceedings were resumed within the hearing [fol. 33] of the jury, as follows:)

The Court: The objection will be overruled.

Mr. Dudnik: Objection overruled, your Honor?

The Court: Yes.

Cross-examination of William Molnar.

By Mr. Dudnik:

Q. You recall, do you not, that Mr. Gallick had an accident underneath the Columbus Road bridge some time in August of 1954?

A. Well, that's when I first heard about it.

Q. You did hear about it, did you not?

A. I just heard about it.

Q. Now, do you recall a swamp or a ditch which ran alongside of the rail under the Columbus Road bridge?

A. Yes, sir.

Q. Is it not a fact that the swamp was there as long as you can remember?

A. Yes.

Q. Is it not a fact that on occasions before August of 1954 you saw dead pigeons and rats in that swamp?

A. Yes.

Q. Is it not a fact that you saw them constantly, sir?

A. Yes.

[fol. 34] Q. Is it not a fact that you saw them in good weather and bad?

A. Yes.

Q. Is it not a fact that although you never counted the pigeons in that swamp, there were several in there all the time?

A. Yes.

Q. And dead rats, sir?

A. Yes.

Mr. Dudnik: Mark this.

(Plaintiff's Exhibit 1, a large photograph, was marked for identification by the reporter.)

Mr. Dudnik: Mark this next, and this next.

(Plaintiff's Exhibits 2, 3 and 4, being large photographs, were marked for identification by the reporter.)

Q. Is it not a fact, Mr. Molnar, that when those rats and pigeons, the dead rats and pigeons, were lying in that ditch, there were bugs and insects around them, is that not a fact, sir?

A. There is always bugs where the stagnant water was.

Q. Were they there when the rats were there and the dead pigeons were there, Mr. Molnar, is that not a fact?

A. Yes.

Q. Now, Mr. Molnar, I hand you what has been marked for identification as Plaintiff's Exhibit 1, and I ask you to look at that. Do you identify this scene, sir?

[fol. 35]

A. That is under the Columbus Road bridge.

Q. That is the ditch we are talking about, isn't it, sir?

A. Yes.

Q. That is what you referred to when you answered my questions, is it not, sir?

A. Yes.

Offer in Evidence

Mr. Dudnik: I offer this in evidence, your Honor. This was taken on August 6, 1957.

The Court: Without objection, it will be received.

Q. Now, Mr. Molnar, I hand you Plaintiff's Exhibit Number 2, a photograph taken in August of 1957; do you identify this scene, sir?

A. That's under the Columbus Road bridge.

Mr. Dudnik: I offer this in evidence, if the Court please.
The Court: Without objection it will be received.
Mr. Leasure: Was that taken on the same date?
Mr. Dudnik: Yes, August 6, 1957.

Q. Now, sir, I hand you a photograph taken on August 6, 1957, marked for identification as Plaintiff's Exhibit [fol. 36] Number 3, and ask you if you can identify this scene, sir?
A. That's under the Columbus Road bridge.
Q. The same ditch, is it not, sir?
A. Yes, sir.

Mr. Dudnik: I offer this in evidence, if the Court please.
The Court: Without objection, it will be received.

Q. Now, Mr. Molnar, I hand you what has been marked for identification as Plaintiff's Exhibit Number 4, a photograph taken August 6, 1957, and ask you whether you recognize this scene?
A. That's under the Columbus Road bridge there. The High Level bridge.

Mr. Leasure: May we see that? We haven't seen that.
Mr. Dudnik: I am sorry.

Q. Mr. Molnar, we are looking through and under the bridge in a northerly direction, are we not?
A. Yes, sir.
Q. So that this ditch that we speak of was on the easterly, along the easterly rail?
A. Yes.
Q. Isn't it a fact that when these pigeons would die in that ditch, they would lay there and remain there for weeks [fol. 37] at a time, sir?
A. Yes, sir.
Q. And the men would work around there, sir?
A. Yes, sir.
Q. Is it not a fact, Mr. Molnar, that you yourself had an experience with a bug under that bridge within a couple of weeks after Jim Gallick's accident?
A. Yes, sir.

. . . . . .

[fol. 40] A. Yes.

Q. Is it not a fact, sir, that while going under the bridge you felt something crawling on your neck and you brushed it, is that a fact?

A. Yes, sir.

Q. Just brushed it from your neck off the left side, sir, is that not a fact?

A. Yes, sir.

Q. A couple of minutes later you felt it on your right side, did you not, sir?

A. Yes, sir.

Q. And you put your hand there and you felt something grab your thumb, didn't you, sir?

A. Yes, sir.

Q. And it was underneath the Columbus Avenue bridge, was is not, sir?

A. Yes, sir.

Q. And then you stopped to look for it, did you not, sir?

A. Yes, sir.

Q. Because you knew of Gallick's condition, isn't that a [fol. 41] fact, sir?

A. Well, I wanted to find out what was crawling on my neck. I didn't know what it was that grabbed my thumb, and I wanted to make sure what it was.

Q. But you didn't find it?

A. We couldn't find it. We hunted for about ten minutes.

Q. Now, handing you Plaintiff's Exhibit 1, sir, do you observe this wooden piling?

A. Yes, sir.

Q. Underneath the bridge?

A. Yes.

Q. And it forms sort of a dam, four-sided dam, does it not, sir?

A. Yes.

Q. And when the water gets in there, it cannot seep out, can it?

A. No, sir.

Q. And it remains there?

A. Yes, sir.

Mr. Dudnik: No further questions. Thank you, Mr. Molnar. You may step down and would you have the man stamp your subpoena, sir.

Call Mr. Rady.

Mr. Leasure: So there is no misunderstanding, is it the [fol. 42] Court's ruling that we cannot ask this witness any questions at this time, that we cannot cross-examine him, or ask him any other questions on any basis at this time?

The Court: Just a minute. Are you making a request now to ask—

Mr. Leasure: I am asking the Court for information as to what the procedure is. We raised our objection to procedure so far. The witness has just been summarily excused, and I am asking the Court what the procedure is from here on.

Mr. Dudnik: If I may be heard, your Honor?

The Court: Surely.

Mr. Dudnik: I do no wish to give the Court advice, but the procedure as I understand it is that they may call the witness as part of their case, as their witness, any time they put their case on. That is the procedure.

The Court: There is no question about that. Counsel for the defense has a right to recall this witness as his witness.

(Thereupon counsel and the Court conferred at the bench outside the hearing of the jury.)

The Court: Any request to cross-examine this witness on [fol. 43] the part of the defense will be denied.

Mr. Dudnik: Mr. Molnar, you may leave, sir.

[fol. 44] Thereupon, the Plaintiff, further to maintain the issues on his part to be maintained, called as a witness Walter Rady, who, having been first duly sworn, was examined and testified as follows:

Direct examination of Walter Rady.

By Mr. Dudnik:

Q. Will you state your name in full, sir
A. Walter Rady.
Q. R-a-d-y?
A. R-a-d-y.

Q. Mr. Rady, may I impose on you to speak loudly enough so these folks can hear you.

The Court: Ready?

A. Rady.

Q. Where do you live, Mr. Rady?

A. 11125 Glenboro.

Q. What do you do, Mr. Rady?

A. I am yard brakeman and foreman for the Baltimore and Ohio Railroad.

Q. How long have you been with them, sir?

A. I have been there 39 years.

Q. 39 years. Did you ever work the downtown Seneca job?

A. On relief, Saturday and Sunday, yes.

Q. And did you work the downtown Seneca job in 1954?

[fol. 45] A. Yes, sir.

Q. In August of 1954?

A. Yes.

Q. That is the job that services the flats and Cuyahoga River area?

A. Yes.

Q. In what capacity did you work, sir?

A. I was the yard foreman.

Q. Yard foreman?

A. Yard foreman.

Q. A foreman is a member of the switching crew, is he not?

A. That's right.

Q. Also known as a brakeman?

A. That's right.

Q. Does the man with the seniority get the foreman's job?

A. Well, not necessarily. It all depends whether he bids it in. But I just happened to bid it in.

Q. Does it pay a little more, higher rate?

A. It pays more, yes.

Q. Mr. Rady, do you know Jim Gallick?

A. Yes, I do.

Q. You have known him for a long time?

A. Yes.

Q. You have worked with him, have you not?

A. Yes.

[fol. 46] Q. Good workman, wasn't he?

A. That's right.

Q. Hard worker?

A. Yes.

Q. As far as you know, did he work steadily?

A. Yes, sir.

Q. Mr. Rady, in connection with your work on the Seneca job, did you have occasion on the days that you worked the Seneca job to be underneath the Columbus Road bridge?

A. Yes.

Q. And that is a daily occurrence, is it not, when you are working that job?

A. That's right,

Q. Is it not a fact, Mr. Rady, that you knew that there existed a pool of stagnant water underneath the Columbus Road bridge, is that not a fact?

Mr. Hadden: Your Honor—

A. Yes.

Mr. Hadden: May I preserve our objection?

The Court: The same objection.

Mr. Hadden: In the future?

The Court: Yes. The objection is overruled and the witness may answer.

A. Yes.

[fol. 47] Mr. Dudnik: May the record show I am calling him for cross-examination; your Honor.

Cross examination of Walter Rady.

By Mr. Dudnik:

Q. That is a fact, is it not?

A. Yes, sir.

Q. Is it not a fact that this pool of water ran near to the railroad as it passed under the bridge, and there was always a lot of pigeons that drank of this pool, and a lot of dead ones laying about, is that not a fact, sir?

A. Yes.

Q. Is it not a fact, sir, that this condition which I described in my last question existed in August of '54, and before that?

A. Yes.

Q. And for a long time before that?

A. Yes.

Q. Isn't that a fact, Mr. Rady?

A. Yes.

Q. And in that depressed area there was accumulated dead birds, pigeons, rats, and other vermin, is that not a fact, sir?

A. There were, yes.

Q. And is this not a fact, Mr. Rady, that most of the accumulation was prevalent under that bridge, isn't that a fact, sir?

[fol. 48] A. Well, may I say something?

Q. You certainly may, sir.

A. I would see pigeons at the bridge, on the Carter Road bridge.

Q. That is the bridge which the B & O runs under a little farther up the road?

A. Yes.

Q. Now, my question is, is it not a fact that the condition under the Columbus Road bridge was most prevalent?

The Court: Do you understand the question, Mr. Rady?

A. I understand the question. The only thing here: I could express myself better in my own way.

Q. I will let you do it, Mr. Rady.

The Court: You are advised to answer.

Q. Can you answer the question that I asked you, and I am going to have it read back to you.

A. All right.

(Following question was read by the reporter:)

"Now, my question is, is it not a fact that the condition under the Columbus Road bridge was most prevalent?"

A. Well, as far as pigeons and vermin, or whatever you have, you would see them in, under the Columbus Road [fol. 49] bridge and under the Carter Road bridge.

Q. Is that the two places you saw them the most?

A. Yes, that's where I saw them the most.

Mr. Dudnik: No further questions. You may go and have the gentleman stamp your subpoena.

Mr. Leasure: May we have the same ruling on this witness as the previous one, your Honor?

The Court: You are making the same request?

Mr. Leasure: Let's make it clear for the record. We wish to retain our objection to permission for the plaintiff to cross-examine these witnesses without establishing the proper foundation under the statute. We are objecting to our inability to cross-examine these witnesses.

Mr. Dudnik: I ask that the jury be instructed to disregard that statement, your Honor, because this was discussed in your presence and was ruled on by you, and he made the same statement in your presence, your Honor, and I ask that the jury be requested to disregard that statement of counsel.

Mr. Leasure: If your Honor please, that is the only way I can keep the record clear as to this witness.

[fol. 50] The Court: The jury is entitled to hear what Mr. Leasure said, and the objection raised by Mr. Leasure, or the request made by Mr. Leasure, however, is denied. You may step down.

Mr. Dudnik: This gentleman will stamp your subpoena.

[fol. 51] Thereupon, the Plaintiff, further to maintain the issues on his part to be maintained, called as a witness William Clason, who, being first duly sworn, was examined and testified as follows:

Direct examination of William Clason.

By Mr. Dudnik:

Q. Mr. Clason, will you give us your name in full, please?
A. William Clason.
Q. Will you spell your last name?
A. C-l-a-s-o-n.
Q. Where do you live?
A. 10918 St. Mark Avenue.
Q. What do you do, Mr. Clason?

A. I am yard foreman for the Baltimore and Ohio Railroad.

Q. Are you here pursuant to a subpoena?

A. Yes, I am.

Q. How long have you been with the Baltimore and Ohio?

A. Fourteen years, the 28th of next month.

Q. Mr. Clason, do you know any men who work on the B & O on the same jobs that you do that are seventy years of age?

A. Well, I really don't know their age. I only know one man that may be seventy.

. . . . . .

[fol. 52] Q. You only know what?

A. I only know one man that may be seventy. I don't know his age.

The Court: The last part of the answer may go out, and the jury will disregard the last part of the answer.

Q. Do you know Mr. English, Pat English?

A. Oh, Pat English? Oh, yes.

Q. How old is Pat English?

Mr. Hadden: Your Honor, let's establish who Pat English is.

Q. What does Pat English do?

A. He is retired right now. He was an engineer.

Q. Did he work on the Seneca Street job?

A. Oh, yes.

Q. How old was he when he retired?

. . . . . .

Q. Had you worked with Jim Gallick in the past?

A. Oh, yes.

Q. On the Seneca job?

[fol. 53] A. Yes.

Q. Did you know him then?

A. Oh, yes.

Q. Was he a good worker?

A. Yes.

Q. Mr. Clason, are you familiar with the bridge, the Columbus Road bridge?

A. Yes.

Q. Have you walked under it many times during your work?

A. Yes.

Q. And is it practically a daily routine?

• • • • • • •

[fol. 54] Cross examination of William Clason.

By Mr. Dudnik:

Q. Is it not a fact, Mr. Clason, that you first learned of Jim Gallick's accident within a couple weeks after it happened, and you learned it from a claim agent of the B & O Railroad?

A. Yes, I learned it from a claim agent of the B & O Railroad, but I am not certain about the couple of weeks afterwards. It may have been, it seems, it may have been longer than that.

Q. What is your best judgment as to when it was that you learned of Jim Gallick's accident?

A. Well, I would say possibly within a couple months.

Q. Within a couple months. But you can't tell us whether it was within two weeks, or within two months, or how close?

A. No, I can't remember.

Q. Your outside guess is two months?

A. It has been too long ago. I don't recall.

Q. Is it fair to state, then, that you learned of Jim Gallick's accident within two months after it happened, and you learned of it from a claim agent of the B & O Railroad?

A. Yes.

Q. Is it not a fact, sir, that back in August of 1954 you [fol. 55] were working what is called the downtown area job?

A. Yes.

Q. To refresh your recollection, sir, did you not tell me or somebody from my office that after Jim was gone for about two weeks a claim agent for the railroad came over—

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[fol. 56] Q. To refresh your recollection, Mr. Clason, did you not tell someone from my office in writing that after Jim Gallick was gone for about two weeks, a claim agent for the railroad came over and said he wanted a statement from you?

[fol. 57] A. Yes, I gave that statement.

Q. Is it not a fact that along the east rail under the Columbus Road bridge there is a depressed and lowered area, as a result of which there is a swamp there, is that not a fact?

A. Yes.

Q. Is it not a fact that there always was about a foot of water or more there, even in good weather, and during the rainy weather it was much worse, is that not a fact?

A. Well, a foot may be pretty deep but there has always been water there.

Q. Give me your best judgment if a foot is pretty deep?

A. Well, I would say an average of two or three inches all the time.

Q. Would you say that rather than the foot which you stated in the statement?

A. Yes, I would.

Q. Is it not a fact that it was there during good weather and bad?

A. Yes, it was.

Q. Is it not a fact that Paul Delaria, the section foreman, had made several attempts to clear this swamp up but was never successful, is that not a fact?

A. Yes, he did work on it to drain it.

Q. Sir, please! Read the question. You can answer that, [fol. 58] if I have stated a fact to you you say yes, and if I haven't stated a fact to you you say no.

* * * * * * *

(Following question was read by the reporter:)

"Is it not a fact that Paul Delaria, the section foreman, had made several attempts to clear this swamp up but was never successful, is that not a fact?"

A. Yes.

[fol. 59] Q. Is this not a fact, that as a result of the condition that existed there, there were quite a bit of bugs, rats, insects, and dead rotty pigeons there, is that not a fact?

A. Yes.

Q. Is this not a fact, that the condition was bad several years ago, and was still bad in August of '54, sir?

A. Yes.

Mr. Dudnik: Thank you, sir. You may step down and have your subpoena stamped.

The Court: Do you want the record to show that you are making the same request?

Mr. Leasure: Yes, if your Honor please.

The Court: The request is denied. You may step down, sir.

[fol. 60] Thereupon, the Plaintiff, further to maintain the issues on his part to be maintained, called as a witness MARY GALLICK, who, being first duly sworn, was examined and testified as follows:

Direct examination of Mary Gallick.

By Mr. Dudnik:

Q. Mrs. Gallick, I am going to ask you to try and keep your voice up so that everybody can hear you. Is that fair enough?

A. Yes, sir.

Q. You are Mary Gallick?

A. Right.

Q. Spell your name, Mrs. Gallick.

A. G-a-l-l-i-c-k.

Q. Where do you live, Mrs. Gallick?

A. 4403 Dawnshire Drive, Parma.

The Court: What is the street?

A. 4403 Dawnshire Road.

The Court: Dawnshire?

The Witness: Dawnshire, D-a-w-n-s-h-i-r-e.

Q. How old are you, Mrs. Gallick?
A. I was 52 on the 8th day of June.
Q. 52?
A. Yes, sir.
Q. And you are the wife of Jim Gallick?
[fol. 61] A. Yes, sir.
Q. How long have you been married?
A. Since 1926.
Q. 33 years, approximately?
A. Yes, sir.
Q. What do you do, Mrs. Gallick?
A. Waitress.
Q. Where do you work?
A. Downtown in Gazelle's.
Q. Mrs. Gallick, I am going to ask you if for several years prior to August of 1954 you have ever observed any eruptions or skin blemishes of any kind on your husband?
A. Never.
Q. On any part of his body?
A. Never.
Q. Do you recall when he worked for the B & O?
A. Oh, yes.
Q. What did he do before that?
A. He was foreman for Hunkin Conkey Construction Company, labor foreman.
Q. How long did he do that, Mrs. Gallick?
A. 12, 13, 14 years perhaps.
Q. Was he a steady worker or not when he was with Hunkin-Conkey?
A. Oh, yes, he was.
[fol. 62] Q. Was he a steady worker up until August of 1954 when he worked for the Baltimore and Ohio Railroad?
A. Yes, sir.
Q. As far as you can recall, prior to August of 1954 what illnesses did Jim have?
A. Not any.
Q. Do you recall any accidents of any kind while he was working on the railroad before that?
A. Well, I believe one time he pulled a ligament jumping on or off a car, something like that. How it happened I don't know. At work, it happened at work.

Q. Do you recall whether he lost any time?

A. Yes, at one time he did. But it wasn't stated as an accident.

Q. I didn't hear you.

A. It was not stated as an accident.

Q. Do you know what the reason for that was?

A. That I couldn't—no, I wouldn't know.

Q. How long before August of '54 was that?

A. I can't be sure of the time.

Q. Was it within two or three years before?

A. It could have been around two years. I am not too sure.

Q. Was Jim laid up a long time with that?

A. No, not too long.

Q. Do you recall what his injury was?

[fol. 63] A. Just a pulled ligament I believe the doctor said.

Q. Mrs. Gallick, before that, or aside from those two incidents which you remember, do you recall any other injuries which Jim may have had in his past?

A. One time I believe he jumped, during work, he stepped off of a working car and he stepped into a hole or something and got hurt.

Q. Was he seriously injured in that accident?

A. He hurt his ankle.

Q. Did it keep him out of work long?

A. Not too long, no.

Q. Was it a matter of days?

A. That I can't answer that. It has been so long.

Q. Mrs. Gallick, I am going to ask you whether you recall a certain day in August 1954 when Jim came home and asked you to look at a part of his body, do you recall that?

A. Yes, I do.

Q. And was it in August of 1954?

A. Yes, sir.

Q. Can you give us a date or not?

A. No, I can't.

Q. Can you tell us what time of the day or night that happened?

A. That is when he came home at night. He came home from work.

Q. When you say at night, about what time?

[fol. 64] A. It was after 11:00.

Q. Were you home?

A. Yes, sir.

Q. Now, what did he ask you to look at, Mrs. Gallick?

A. He told me he was sick, that there was something on the back of his leg, it was stinging, a burning sting, and he wanted me to look at it.

Q. And did you look at it?

A. Yes, I did.

Q. Can you stand up and perhaps point on yourself about where he asked you to look, what part of his leg?

A. It was back in here.

Q. Now you are pointing, you have got your hand on the right leg. Was it the right or left?

A. It was on the left. You could see it there.

Q. You are sure of that?

A. Yes, sir.

Q. And did you look?

A. Yes, I did.

Q. Will you tell the jury and the Court exactly what you saw?

A. Well, there was a welt just like when you get a bite.

Q. What color was it?

A. It was pink.

Q. What was the size of it?

A. About the size of — about that size, on my nail. Do [fol. 65] you like that.

Q. Are you now saying about half a finger nail?

A. Yes, it.

Q. Did it cause you any concern when you saw it?

A. No.

Q. When did you next see it, Mrs. Gallick?

A. The next morning.

Q. Did you look at it again?

A. Yes, I did.

Q. What did you see the next morning?

A. Well, it began to get deeper in color, deeper in color.

Q. What kind of a color?

A. Pink. It was a deeper pink.

Q. Did it give you any concern?

A. No.

Q. Did Jim go to work?

A. Yes, he did.

Q. When did you next look at it?

A. At night when he came home.

Q. What did it look like that?

A. Well, it was getting a little redder, little pinker. It kept getting pinker.

Q. Did it give you any concern?

A. Not too much.

Q. Did there come a time when you saw it and you were [fol. 66] concerned about it?

A. Yes, sir.

Q. How long after the first time that you saw it?

A. About the fifth day.

Q. And when you saw it on the fifth day, tell the Court and jury what it looked like.

A. Well, it began to get larger and real pink, real deeper pink around, and it began to raise.

Q. Did Jim do anything about it that day?

A. Well, he would always wash it with soap and water.

Q. Did he do anything after you saw it as you described?

A. I said to go see a doctor.

Q. Did he see a doctor?

A. I just don't remember how soon after.

Q. I say did he go to see a doctor?

A. Yes, he did.

Q. And who was the doctor?

A. Dr. Jacob Heller.

Q. Did you continue to observe it after that?

A. Yes, sir.

Q. And did it change in size and color as you continued to observe it?

A. It kept getting larger and it kept burning. That's why he kept after me. It kept burning him.

Q. Mrs. Gallick, did there come a time that your husband [fol. 67] went to another doctor?

A. Yes. We were alarmed then because Dr. Heller, he had gone to Dr. Heller and Dr. Heller was going to put him in the hospital. Jim had never been sick, so he was afraid to go to the hospital.

Q. So what did you do?

A. So then a friend of ours suggested, in fact I inquired if he knew a doctor that he might recommend, because Jim didn't want to go to the hospital. He wanted another doctor's opinion. So he went to Dr. Victor Ippolito.

Q. Did you go with him?

A. Yes, I did.

Q. Now, on the day that you went to Dr. Ippolito, were you there when Dr. Ippolito looked at this?

A. Yes, sir.

Q. Will you tell us what it looked like then?

A. By that time it was about the size of a half a dollar and it had raised and it had been draining on the side, and it looked very ugly.

Q. Did Dr. Ippolito look at it?

A. Yes, he did.

Q. Did he upon looking at it the first time, and examining it, suggest anything?

A. Immediately. Dr. Ippolito said "Into the hospital for you."

Q. Beg pardon?

A. He said immediately as soon as he looked at it, examined it, he said, "Jim, you are going to the hospital."

Q. And did he go?

A. Well, there was no bed. He was going to put him in the hospital that day, but there was no bed at Marymount. So he had to wait until Saturday of that week.

Q. And did he put him in then?

A. Yes, he did.

Q. Mrs. Gallick, do you know whether or not Jim received any surgery while he was at the hospital?

A. Oh, yes.

Q. I will ask you, Mrs. Gallick, how long after he entered Marymount Hospital did he receive his first surgery?

A. I believe that very week, the first week.

Q. Were you there when he came out of surgery?

A. Oh, yes.

Q. Was he in surgery more than once?

A. Oh, yes.

Q. How often did you visit him?

A. Every day.

Q. And did you know when he went to surgery?

A. Yes, sir.

Q. How would you know?

A. The doctor informed me that he would be going to surgery, and I was there before he left, and when he got out of surgery.

[fol. 69] Q. Did you see Jim after all of these surgeries?

A. Yes, sir.

Q. Describe to the jury how he looked.

A. Sick, very sick.

Q. Were you able to talk to him?

A. No, because he was under medication.

Q. Now, do you know how long he was in Marymount Hospital the first time?

A. I don't remember if it was three months or two months, something along in there.

Q. Well, the record will show that it was from September 18th to January 4th. Is that about right?

A. Yes.

Q. Now, at about the time or close to January 4th, shortly before he was sent home, were you able to observe Jim's legs and body?

A. Yes, sir.

Q. Will you describe to the jury what you saw?

A. Well, they had operated on the left leg that was injured, and it was deep, and it was about this much in size (indicating), open, and then the donor—they used the right leg to take the skin off.

Mr. Dudnik: Can you folks hear?

A. They took the skin off the right leg to cover up the one, the bad leg that they had operated on. And it looked [fol. 70] like it was going to heal, but it hadn't. It had formed a scar tissue as the doctors called it, is what it was.

Q. Besides that mark that you described, were there any other marks at that time, in January of 1955?

A. No.

Q. Just the right leg where they took the skin?

A. Yes, sir. The left leg was injured.

Q. From the time that you first saw that little mark on Jim on the first day until the time he went into Marymount

Hospital, or until the time rather when he went to Dr. Ippolito, was there one or more than one eruption?

A. One, just that one.

Q. How long was he home when he left the hospital?

A. It seemed to me like about three months, something like that.

Q. Now, I gave you some wrong data, and I would like to correct it, gentlemen.

The records will show that he was in Marymount Hospital from September 18th to December 8th, and I said January 4th. It is December 8th of 1954, Mrs. Gallick.

A. Yes.

Q. Now, when he went home he was home about a month, was he not?

A. Yes, sir.

Q. Will you describe his condition during that month?

[fol. 71] A. He was very sick.

Q. In what way, Mrs. Gallick?

A. Well, he had those—he had the open wound that had to be dressed. It was very very painful.

Q. Who dressed them?

A. I dressed them.

Q. How did you dress it?

A. The doctor gave me instructions as to how to dress them.

Q. How often did you dress them?

A. Morning and night, and put theromyacin on, and it had to be changed.

Q. Did you take care of him constantly?

A. Constantly.

Q. Were you working then?

A. I was.

Q. Who took care of him when you were at work?

A. The neighbors looked in on him.

Q. Now, Mrs. Gallick, he went back to Marymount Hospital, as I said, he was home about a month, on January 4 of 1955, did he not?

A. Yes, sir.

Q. How long did he stay in the hospital the second time?

A. A year and a half or better.

Q. To refresh your recollection, it was about a year and [fol. 72] a quarter, about 15 months, Mrs. Gallick.

Did you see him at the hospital?

A. Every day.

Q. How long did you stay there?

A. I would stay with him about until quarter of three, because I was due at work at four o'clock.

Q. And did you observe him every day?

A. Every day.

Q. During that period how did he progress, was he getting better or worse?

A. He had very awful pains, horrible awful pains.

Q. How did you know that?

A. Because he cried most of the time. He kept grabbing for something to hold onto, with the pains. He couldn't pass his bed unless he would complain of horrible pains.

Q. As time went on during the second stay, were there any more eruptions on his body?

A. Yes. It went wild. It just broke out in different places.

Q. Tell us where it went?

A. His ankle went, which took the entire heel in practically.

Then the place—then the donor, the right leg, had gone, which had been the donor, that had gone.

Then I believe there was a place on his side or underneath his arm. I am not too sure of that, because they went so rapidly that you couldn't keep up with them.

[fol. 73] Q. Were they getting larger?

A. Oh, yes.

Mr. Dudnik: Mark these.

(Plaintiff's Exhibits 5, 6, 7, 8, 9 and 10, being photographs, were marked for identification by the reporter.)

Q. Mrs. Gallick, I am going to hand you a photograph that has been marked for identification as Plaintiff's Exhibit 10, and I ask you who is the man in this picture?

A. That is Jim and his nephew, his brother's son.

Q. Is that Jim Gallick?

A. Yes, it is.

Q. How long before 1954 was it taken?

A. About a year before.

Mr. Dudnik: I should like to pass this around to the jury at this time, your Honor.

The Court: You may.

OFFER IN EVIDENCE

Mr. Dudnik: Wait. Marshall reminded me, your Honor, that I have to offer it in evidence first.

May I offer it in evidence?

The Court: Without objection it will be received in evidence.

Ladies and gentlemen of the jury, at this time there will be a brief recess.

[fol. 74] You may return to the jury room once more with the admonition do not talk about this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

By Mr. Dudnik:

Q. Mrs. Gallick, I believe you told us he was in Marymount Hospital for some 15 months?

A. Approximately.

Q. And after that he came home, did he not?

A. Yes, he did.

Q. And he was home how long, do you recall?

A. I can't be too sure of the dates because

Q. Would this be right, according to the hospital records he was home from March 8th of 1956 until July 30th of 1956?

A. That is almost three and a half months.

Q. About four or five months, about five months, is that about right?

A. Yes. That would be about right, but I am not too sure on the time.

Q. Could you describe to the jury where he spent his time during that five months?

A. In bed.

Q. Could he go to the bathroom?

A. No, not at last, no, not when he came home that time, no.

Q. How many openings did he have that were sore? [fol. 75] A. At that time the left leg and the one that they used for the donor, his ankle—

(Interruption.)

Q. Will you hold up a little bit, please. Just hold up. Now keep your voice up.

A. There were so many you just can't remember.

Q. What was the appearance of the original one? What was the size of it at that time?

The Court: I am sorry, Mr. Dudnik. I was distracted myself. I think the question was—

Mr. Dudnik: How many openings were sore, and there were so many you just can't remember.

Q. My next question is:—Could you describe the size of the original one on the back of his left leg?

A. Well, I couldn't show you, only if I stood up.

Q. All right.

A. I will have to show you on my right leg. It extended from here to here and it covered all this in here. The doctors—

Q. How did it look?

A. Oh, it looked vicious. It was a big hole where you could see the tendons, as he had to elevate his foot, whatever way they could put it for him.

The tendons and the flesh would be just hanging through there.

Then when I would dress them the doctor instructed me [fol. 76] to take the gauze and the medication and I would pack that in folding the gauze and packing that in there.

Q. Into the opening?

A. Into the openings. They were draining.

Q. Were they draining?

A. Draining awful bad with a terrible odor.

Q. How often did you pack them?

A. Well, twice a day and sometimes if they drained more I had to dress them again, because they drained more.

Q. What happened when you took the packing off?

A. He would just scream with pain. And often times he would grab my arm in order to keep from hurting, he would ask me to step aside for a little bit until he could get his breath because it was so painful.

Q. Was that everytime you dressed him?

A. All the time, all the time.

Q. Who took care of him during those months that he was home?

A. The neighbors looked in on him. We had a nurse that lived in the back of us. She looked in on him maybe by the hours, came in.

Q. Who took care of him when you were not working, during the day when you weren't working who took care of him?

A. I took care of him always.

Q. Now, he then entered the Cleveland Clinic on July 30th, 1956?

[fol. 77] A. Yes, sir.

Q. Do you remember that?

A. I sure do remember it.

Q. And according to the Cleveland Clinic records he was there from July 30, 1956, to December 21, 1956?

A. That's right.

Q. How often did you see him?

A. Every day.

Q. How was Jim doing?

A. Very bad.

Q. He left the Clinic on December 21, 1956, and he was home until February 5, 1957; a period of about five weeks or six weeks.

Do you remember that period?

A. I sure do.

Q. What did you do for him?

A. I kept dressing him the way that I was instructed.

Q. And was that daily?

A. Every day, every morning and night.

Q. Were they still — were they running?

A. Running, running sores. Running. It was green and gray and all different horrible colors on it. And they were deep.

Q. Was there an odor to it?

A. Unbearable odor, but I didn't mind it.

Q. Now, he went back to the Clinic on February 5th, 1957, [fol. 78] and he stayed until April 13th of '57?

A. Y .

Q. About two and a half months. Why did he go back, do you know?

A. He got very bad. He was very bad.

Q. Now, during the first stay at the Clinic was he operated on?

A. On the first day? I can't remember if he did on the first day.

Q. Stay, not day. During the first entrance to the Clinic did they operate on him?

A. Oh, yes, they operated on him.

Q. How many times, do you know?

A. I don't know how many operations he had before the amputations. I don't remember. There were so many. I can't remember.

Q. Were you there all the time?

A. Always there.

Q. How did he look during that time?

A. Horrible, after each operation he looked worse.

Q. Then during the second stay at the Clinic between February 5th of '57 and April 13th of '57, was he operated on?

A. Yes, he was.

Q. Now, then, he went back to the Clinic on April 25th, 1957, and stayed until June 22nd of 1957, about two months, did he not?

A. Yes.

[fol. 79] Q. I am going to hand you five photographs, they are Plaintiff's Exhibits 5, 6, 7 and 8, and ask you to look at them and tell the jury whether Jim's body appeared or they correctly represent how Jim's body appeared while he was at the Cleveland Clinic?

A. Oh, yes.

Q. Look at all of them.

A. They got a lot worse than these.

The Court: Mr. Dudnik, I notice that you handed the witness five of them. You only mentioned four. You mentioned Plaintiff's Exhibits 5, 6, 7 and 8?

Mr. Dudnik: Yes.

A. They got worse than this.

Q. They got worse than this?

A. Much worse than this. They got a lot worse.

Mr. Dudnik: Plaintiff's Exhibits 6, 6, 7, 8 and 9. Thank you, your Honor.

Your Honor, at this time while I don't wish to pass these to the jury, I would like to hold them up and give them an opportunity to see them.

The Court: No objection, you may do so.

Mr. Dudnik: May the record show I offer them in evidence, your Honor. I think I overlooked it. May the [fol. 80] record show that they are offered?

The Court: Without objection, they may be accepted in evidence.

Q. What happened on May 21, 1957 do you recall?

A. I believe that is when the first leg was amputated, the left leg was amputated.

The Court: Mrs. Gallick, will you take your time. I know I wasn't able to hear you. Could you jurors hear that back there?

Q. Mrs. Gallick, speak slowly and loudly. Everyone has to hear what you say. Now I am going to ask the question again. What happened on May 21, 1957?

A. I believe that is when they amputated the first leg, the left leg.

Q. They amputated the first leg?

A. Yes, sir, the left leg.

Q. Describe how Sam was when he came out of surgery, after he got over the ether or whatever they gave him?

A. He was very bad.

Q. What were his spirits?

A. Well, naturally he was broke-hearted, because it went so fast. And it is not easy for anyone to take your leg.

Q. What happened on June 12, 1957?

A. Just a minute, just a minute.

[fol. 81] Q. Take your time.

A. I can't be sure of the dates. The dates are confusing, because they were all like a nightmare.

Q. Do you remember that as being the day that they took Jim's other leg off?

A. As I said, I am not sure on the date. What date was that?

Q. June 12th of 1957, is that about when they took Jim's other leg off?

A. I can't be sure of the dates, because it has all been a horrible nightmare.

Q. They did, however, within three weeks take Jim's other leg off, didn't they?

A. Yes.

Q. Were you there?

A. I sure was there.

Q. Can you tell us a little about him when he got out of surgery, the next day, the next week?

A. Well, he was very bad. He was very weak from it all, and then after when he had realized that his both legs were gone, I can't describe it. It was horrible.

Q. Now, Mrs. Gallick, he was at the Cleveland Clinic, following those amputations until July 21, 1957. Is that about right, if the record shows it?

A. I beg your pardon?

[fol. 82] Q. July 21, 1957, is that about right, that he was dismissed or that he left the Cleveland Clinic?

A. Yes.

Q. Did he go home from there?

A. '57 did you say?

Q. Yes, or did he go straight to Highland View Hospital?

A. He went to Highland View Hospital. He never came home again.

Mr. Leasure: Isn't that the wrong date?

Mr. Dudnik: No. July 21, 1957.

Q. Is that the date?

Mr. Leasure: That was '58.

A. '58, I am not—

Mr. Dudnik: Well, let's make sure. What is the discharge date there?

Mr. Leasure: July 21, 1958.

Q. Then he was there about a year after they amputated the leg?

A. Yes, he was.

Q. I am sorry.

The Court: Is that at the Cleveland Clinic until July 21st of '58?

Mr. Dudnik: Just a moment, your Honor. I am a little confused here.

Q. Was the surgery in '58? Was the surgery in '58?

[fol. 83] A. In '58.

Q. I am sorry.

A. The dates are all so confusing.

Q. They are confusing to me, too.

A. Because we lost track of the time.

Mr. Dudnik: In '58, your Honor.

The Court: Both of them in '58? The records, of course, will speak for themselves.

Mr. Dudnik: They will speak for themselves, your Honor.

The Court: But let's get it cleared up for the record.

Q. Do you remember what year?

A. In '58, yes.

Q. How long altogether was he at the Cleveland Clinic?

A. Mr. Dudnik, I can't be sure of the dates. I cannot be sure of the dates.

Q. However, from the Cleveland Clinic—

A. The doctors' records will have it all.

Q. Is it fair to state now that he was in the Cleveland Clinic for about two years with the exception of the two months or so that he came home?

A. That's correct.

Q. I am sorry I confused you, and myself, Mrs. Gallick.

[fol. 84] Where did he go from the Cleveland Clinic?

A. He went to Highland View Hospital and he has remained there since.

Q. Has he been home since?

A. No, he has not been home. He has been very bad.

Q. Mrs. Gallick, where is Highland View Hospital?

A. Out on Richmond Road.

Q. How often do you see Jim?
A. Every day.

Mr. Dudnik: I have no more questions.

Cross examination of Mary Gallick.

By Mr. Hadden:

Q. Mrs. Gallick, I want you to understand I don't want to make this any more difficult for you than necessary. If you would like to stop, please tell me. I only have one or two questions, and they relate to the time back in August of 1954, when Jim first came back to the house and described that he had been bitten, according to what your testimony has been.

A. Yes.

Q. I wonder if you could describe in somewhat more detail exactly what the appearance of the place he complained about was?

A. Well, I will have to show you on my right leg again. I will say—

[fol. 85] Q. I don't care where it was. I just want to know what it looked like.

A. What it looked like?

Q. Yes.

A. It was back in here. It was about half the size of my nail. And it was a welt like—like you would see a bite, and it was pink.

Q. It was all pink?

A. Around, you could see, then there was a little red thing in there. You could see it was a bite, you could see it was a sting.

Q. There was a little red what in it?

A. It was a welt with a little red thing. You could see that it was a sting.

The Court: Little red thing.

Q. Little red thing?

A. Yes. It looked like it might have been, but as you put your thumb on it, he asked me to touch it because it felt,

it still stung and hurt in that way. As I put my thumb on it, it was warm to my thumb.

Q. Now, the thing, can you describe the thing that you saw in it?

A. How could I describe a little red speck in there?

Q. A red speck?

A. Yes, it was.

Q. Is that the best you can do about describing it?

A. Yes. You could see, you knew it was a welt, it was a bite. You could see it because it was different from the other flesh.

Q. One or two more questions, Mrs. Gallick. Since August of 1954 when this first started, your husband as you testified has been in considerable pain, is that right?

A. The worst pain that any man ever lived through.

Q. If you will just answer my question we will be through a little quicker.

A. Yes.

Q. Is it fair to say, Mrs. Gallick, that the pain has varied, sometimes it has been worse and then it has gotten better for a time and then perhaps it has gotten worse, is that so?

A. No, it continued on. It continued on in a horrible pain.

Q. I am not saying that it stopped at any time. I merely

A. No, it never stopped, it never stopped.

Q. But was it worse at some times than at others?

A. I think Jim could answer that better for himself.

Q. You don't feel you can answer that, that is quite all right.

A. No, I can't answer for him.

Mr. Hadden: That is all. Thank you. You may step down.

Mr. Dudnik: We will call the Plaintiff.

[illegible] The co-partnership heretofore existing between James J. Gallick, plaintiff herein, and [illegible] for the purpose of carrying on business as [illegible] and for the settlement of the affairs of said co-partnership, and for the dissolution thereof, and for the appointment of a receiver of the assets of said co-partnership, and for the winding up of the business of said co-partnership, and for the distribution of the assets of said co-partnership among the parties entitled thereto, and for the payment of the debts of said co-partnership, and for the taking of an account of the moneys due to and from said co-partnership, and for the payment of the moneys due to and from said co-partnership, and for the payment of the moneys due to and from said co-partnership, and for the payment

A. (Witness nodded.)

Q. How far did you go in school, Jim?

A. 8th grade.

Q. Where?

A. Minneapolis.

Q. What did you do when you got out of school?

A. Oh, various jobs. I drove a

Q. Can you bring us up to date until the Hundred Cent job?

A. I worked in a grocery, delivering groceries and I drove a truck. I ran errands for the Great Northern

[fol. 89] Q. And then what?

A. Then I went, moved to Chicago.

Q. Hold it, Jim, we have got a little competition.

(Interruption.)

You say you moved to Chicago?

A. To Chicago [illegible]

Q. Office work?
A. No.
Q. Always with your hands and feet?
A. Hands and feet.
Q. Jim, when you left the Hunkin-Conkey where did you go to work?
A. Baltimore and Ohio Railroad.
Q. Approximately what year?
A. 1944.
Q. So that in '54 you had been there 10 years?
A. 10 years.
Q. What did you start as?
A. As a brakeman.
Q. And did you continue to be a brakeman up until 1954?
A. No. I was promoted to yard foreman shortly after I started.
Q. And were you a yard foreman in 1954?
A. I was not. I worked as both up until '54.
Q. You worked both?
A. Yes.
Q. Jim, what diseases of any kind or sicknesses did you have in your early childhood and your early youth?
A. None. All I remember, I had one, smallpox.
Q. Smallpox?
[fol. 91] A. Yes.
Q. How old were you then?
A. Well—
Q. When you were a baby?
A. No, when I was 10, 12 years old.
Q. Did you get over it?
A. Oh, yes.
Q. Did you ever have any kind of a skin condition?
A. I never as much had a pimple on me.
Q Did you ever have sugar diabetes?
A. Oh, no.
Q. Did you ever suffer from colitis?
A. I don't know what it is.
Q. Did you ever suffer from Buerger's Disease?
A. I don't know what that is.
Q. Did you ever have an allergy of any kind?
A. No.

Q. I take it then up until 1954 you were a man of good health?

A. Good health.

Q. What did you weigh in August of 1954?

A. 204 pounds.

Q. What do you weigh now?

A. 90. Go ahead.

Q. Can we go on, Jim?

A. Go ahead.

[fol. 92] Q. Did you ever have any serious accidents before August of 1954?

A. Sprained ankle.

Q. On the railroad?

A. On the railroad, and I guess a pulled ligament.

Q. Did you ever have a sprained back?

A. Yes, yes.

Q. Were any of those serious accidents, Jim?

A. None, no.

Q. Were any of them loss of time accidents?

A. No.

Q. Your wife was saying something. Would you explain what your wife said—

A. Yes, yes, there was one time an accident when I was working for the DuPonts. I got off a tank car and it was in kind of a hole that I stepped in, and I sprained my ankle and I broke a couple of toes.

Q. When was that, Jim?

A. Oh, that must have been about '51, '52 somewhere.

Q. Did you get over that all right?

A. Yes.

Q. Now, your wife said something about accidents and no accidents. I think you can explain what the railroad terms are for lost time accidents and no lost time accidents.

A. Well, when you don't lose no time, that is no lost time.

[fol. 93] Q. Are there times when you can't work for a few days after an accident they can let you mark in and off so not to make it a reportable accident?

A. They did me for 30 days.

Q. What is the reason for those things?

A. Well, I think mostly—

Mr. Leasure: I think we will object, your Honor. The jury doesn't know for sure. He has indicated that he thinks, and I don't think it is relevant here anyway.

The Court: Objection sustained.

Q. At any rate, none of the accidents you had were serious?

A. No.

Q. Jim, when did you start to work on the Seneca downtown job?

A. Oh, I would say around 1950.

Q. Now, from 1950 to 1954 was that your regular job?

A. That was my regular job.

Q. And what trick did you work most?

A. The second trick.

Q. And what is the time of the second trick?

A. 3:00 to 11:00.

Q. Jim, just tell us a little bit about that Seneca Street job.

The Court: Is that 3:00 p.m. to 11:00 p.m.?

[fol. 94] Mr. Dudnik: 3:00 p.m. to 11:00 p.m.

Q. Just tell us a little bit about the downtown Seneca job, sometimes called the downtown job?

A. Downtown.

Q. Sometimes the Seneca job, same thing?

A. Yes.

Q. What is the downtown Seneca job?

A. It refers to the freight house, to switch, you take—

Mr. Dudnik: Can all you folks hear? Thank you.

A. You take empties in and out of the freight, out of the firms, and you would place, you would pull the freight house and take the loads that were loaded cars out of the freight house, classify them, and take them to Clark Avenue.

Q. In other words, I take it there were cars along the industry, what do they call them, platform sidings?

A. Yes, and we have a yard there.

Q. And you move out the empties and pull in the full ones, that is a switching operation, isn't it?

A. That's right.

Q. And that job is mostly in what territory, of what part of town?

A. Well, it would be the flats.

Q. The flats?

[fol. 95] A. The flats.

Q. That is around the river, isn't it?

A. Yes, right alongside the river.

Q. Now, how many men work on one of those jobs or crews, one of those jobs? I will withdraw that.

That was a very very—not for a railroader—that must have been a silly question.

You have crews working together?

A. Yes.

Q. How many men in a crew?

A. Well, there would be the yard foreman and this particular job had three helpers.

Q. A yard foreman and three helpers?

A. And an engineer and a fireman.

Q. Now, we know the engineer runs the engine.

A. Right.

Q. The fireman sits next to him?

A. Yes.

Q. He stokes the fire?

A. Right.

Q. Now, the foreman, is he a switchman, too?

A. Yes, yes.

Q. What is the difference between a helper and a foreman?

A. Well, the foreman has the responsibility of the job, to run the job.

[fol. 96] Q. Now, three helpers, and they are switchmen?

A. They are switchmen.

Q. Do they sometimes work with the engine? I am talking about the four—

A. Yes.

Q. And do they sometimes work away from the engine?

A. Away.

Q. Are there times when the men ride the engine?

A. Right.

Q. Are there times that the men walk and the engine follows them?

A. Yes.

Q. Does that all depend on the kind of work you have to do?

A. That's right.

Q. Now, in August of 1954 on the day that you had your accident, what were you then, the helper or the foreman?

A. I was the yard foreman.

Q. You were the yard foreman?

A. Yes.

Q. Did you bid in that job?

A. No. The regular foreman was off.

Q. So you got it?

A. Yes.

Q. Does the foreman's job pay more than—does the foreman get more than the brakeman?

[fol. 97] A. It does.

Q. In '54 how much was a brakeman getting a day?

A. I think it was $17.54.

Q. And how much was the foreman getting?

A. $18 something.

Q. Have there been any increases in that rate since, do you know?

A. Oh, I think there has. I think there has been two increases.

Q. Since then?

A. Since then.

Q. Now, when you worked that trick, second trick, what time did you normally get down to work?

A. Around 2:00.

Q. And where did you go?

A. Well, you park your car, go to the yard office.

Q. And what is the operation from there?

A. You get to the yard office about quarter to 3:00, you would call Clark Avenue, get your orders as to consist of your work, and then proceed to the engine and go to work.

Q. Now, was this a daily routine?

A. That is daily.

Q. And the foreman called and got the orders?

A. Yes.

Q. Jim, of course you are familiar with the Columbus Road bridge?

[fol. 98] A. Right.

Q. Before 1954 on your Seneca Street job that you worked for four years, how often did you get to go under that bridge every day?

A. Every day.

Q. More than once a day?

A. Sometimes more than once a day.

Q. Did you sometimes walk underneath?

A. Yes, we would walk.

Q. And did you sometimes ride underneath?

A. And sometimes ride.

Q. Now, how many tracks do they have under that bridge?

A. One track. It is two rails.

Q. One track which is two rails?

A. Yes.

Q. And what was that track known as?

A. The River Track.

Q. Jim, that track runs in which direction?

A. North and south.

Q. Railroaders call that different.

A. East and west.

Q. In other words, railroad directions it is east and west?

A. East and west.

Q. But the way we folks look at it it is north and south?

A. North and south.

[fol. 99] Q. Jim, can you describe the condition underneath the bridge, particularly along the east rail as it was in August of 1954?

A. Well, there was stagnant water, dead rats, pigeons, with insects flying above and in the water.

Q. Were those rats and pigeons in the water?

A. In the water and along the rail.

Q. How long, if you know, had that condition which you now describe existed before August of 1954?

A. As long as I remember.

Q. Well, how long do you remember, Jim?

A. Well, the length of time that I worked for the B & O Railroad, 10 years.

Q. Was it ever cleaned up?

A. I have never seen it cleaned up.

The Court: I didn't hear that.

Mr. Dudnik: "I have never seen it cleaned up."

Q. Had you ever complained about it to anyone?

A. Yes, to Paul Delaria, the track foreman.

Q. To Paul Delaria, and he is what?

A. He is the track foreman.

Q. Had you complained about that before August of 1954?

A. Yes, a long time before.

Q. Had you complained about it once or more than once?

A. More than once.

[fol. 100] Q. Jim, I am going to hand you a photograph which has been marked Plaintiff's Exhibit No. 2, taken two years after your accident, and ask you if it correctly represents the appearance of the condition you described underneath the Columbus bridge on the day that you had your accident?

A. Except for the dead rats and pigeons. I don't see no insects.

Q. You say except for the dead rats and the pigeons and insects?

A. And insects.

Q. Except for that, is that the way it looked?

A. That way and much worse.

Q. That is Plaintiff's Exhibit No. 2. Do you say the same or not for Plaintiff's Exhibit No. 1 taken in August of 1957?

A. I would say the same.

Q. By the way, this Plaintiff's Exhibit No. 1, Jim, is this top rail the east or west rail?

A. That is the east rail.

Q. In other words, is north in this direction, north in this direction?

A. North would be along going along the track.

Q. I see. But that is the east rail?

A. Yes.

Q. Perhaps you can tell me better about Plaintiff's Exhibit No. 4 which is a picture taken in August of 1957, [fol. 101] three years after your accident.

Now, in this picture which way are you looking as you look into the picture?

A. North.

Q. That makes the east rail the one on the right, isn't it?

A. That's right.

Q. Now, do you remember the day you had your accident?

A. I do.

Q. Can you tell us the date now, the exact date?

A. No, I can't say the date.

Q. On that day, Jim, when did you leave home?

A. As usual, at 2:00.

Q. How did you feel that day?

A. I felt good that day.

Q. What was your state of health?

A. Very good.

Q. When you got to work—did you drive to work?

A. I drove to work.

Q. You parked your car?

A. Parked my car.

Q. Do you recall about what time you got into the yard office, is that what you call it?

A. Around 2:00.

Q. That gave you how much time before you started?

A. An hour.

[fol. 102] Q. Why did you get there so early?

A. Well, it was nothing unusual for me. I always got a job ahead of time.

Q. And did you call for orders?

A. About a quarter to 3:00 I called for orders.

Q. And did you get them?

A. I got my orders.

Q. What is the first thing you did, Jim?

A. The first thing, we picked up our lunches and lanterns, went to the Diesel, put them on the Diesel, and went over to the spur yard.

Q. All right. Now, where was the Diesel with relation to the office?

A. Directly across from the yard office.

Q. And you say you put your things in the Diesel and went to the spur track?

A. Spur yard.

Q. Spur yard?

A. Yard.

Q. Was that at another track?

A. Yes, that was another track.

Q. Did you walk there or ride the engine there?

A. No, I walked there.

Q. What did the other men do, if you recall?

A. The head man took the engine up to the switch, threw [fol. 103] the switch for the Diesel to back down into the spur yard in track 7.

Q. Now, Jim, do you remember the engineer on that day?

A. Pat English.

Q. Do you know how old Pat is or was then, if you know? If you don't know, it is all right.

A. He was over 65.

Q. Who was the fireman?

A. That I don't know, because he was called, I think he was called on the earlier shift, on the morning shift.

Q. Now, can you not tell us the name?

A. No, I can't.

Q. Can you tell us the other three members of your switching crew?

A. No, I don't remember either, for the simple reason we were—they was men that was called for the locals, which left me the foreman, and that's the reason I don't remember.

Q. In other words, you cannot recall who was with you that day?

A. No, I don't.

Q. Now, after you went to the spur yard what did you do then?

A. Well, there was a couple of cars on the head end of track 7, and we coupled onto them and shoved them to the rear of track 7.

Q. Jim, I am not going to bother you with that airplane [fol. 104] picture. Where was this operation with relation to the Columbus Road bridge?

A. Well, it was underneath it.

Q. Underneath it?

A. Underneath it.

Q. You did some switching underneath, I mean, movements underneath the bridge?

A. Yes.

Q. Then did there come a time when you left your engine and started to walk under the bridge?

A. Yes.

Q. And this mishap which you are going to tell us about, this accident that you are going to tell us about, did it happen on your first walk through under that bridge?

A. The first walk.

Mr. Dudnik: Your Honor, this is as good a time as any to recess.

The Court: Ladies and gentlemen of the jury, we will recess now for the luncheon hour, and because of some duties the Court has to perform, we will recess until 2:00. You will have your lunch and return for action at 2:00. You may retire to the jury room once more with the admonition that you do not talk to anyone about this case, [fol. 105] not even amongst yourselves.

(Thereupon an adjournment was taken to 2:00 o'clock, p.m., June 11, 1959, at which time the following proceedings were had:)

[fol. 106]

Thursday afternoon session, 2:00 p.m., June 11, 1959

Thereupon the Plaintiff, JAMES T. GALLICK, resumed the witness stand and was further examined and testified as follows:

Direct examination of James T. Gallick, resumed.

By Mr. Dudnik:

Mr. Dudnik: Mr. Romito, will you read the last two questions and answers?

(Last two questions and answers were read by the reporter.)

Q. Jim, I want to straighten one thing out. You told the jury you had smallpox when you were a child, and I asked

you about that during the luncheon intermission; was it smallpox?

A. Chicken pox.

Q. Chicken pox?

A. Yes.

Q. Are you sure of that?

A. Yes.

Q. Jim, when you started for the bridge where had you come from?

A. The spur yard over Lime Road.

Q. Over Lime Road?

A. Yes.

Q. Onto where?

[fol. 107] A. Onto the River Track.

Q. Onto the River Track, that is the track that you told us that leads under the bridge?

A. Under the bridge.

Q. And did you start from that point for the bridge?

A. Yes.

Q. How far were you when you got off of Lime Road and onto the River Track, how far were you from the entrance to the bridge?

A. About 20 or 30 feet.

Q. 20 or 30 feet, and would you then be going in which direction as you go toward the bridge?

A. North.

Q. Would you then be going in the direction that you see looking at Plaintiff's Exhibit 4?

A. Yes.

Q. And at that time I take it you were on the River Track?

A. The River Track.

Q. Did you then start for the bridge?

A. Yes.

Q. Did you stop at any point under that bridge or did you go all the way through without stopping?

A. No, I stopped under the bridge.

Q. What was the purpose of your stopping?

A. To see where the engine was, where the Diesel was coming down.

[fol. 108] Q. When you went in first, as you enter the bridge didn't you know where the Diesel was?

A. No.

Q. Did you know where it was going to be later?

A. Well, I knew, I had an idea where it was going.

Q. Now, then, you say then you stopped to see where it was?

A. Where it was, yes.

Q. Where were you in that bridge or under that bridge when you stopped, in other words, were you closer to the entrance, closer to the other side, or closer to the middle?

A. I would say closer to the middle.

Q. To the middle?

A. To the middle.

Q. When you stopped where were you standing with reference to that ditch?

A. Alongside the track, that would be the west track of the River Track.

Q. You were not alongside the rail closest to the ditch, were you?

A. No.

Q. You were on the other side?

A. On the other side.

Q. And when you stopped, as you stopped which way were you headed?

[fol. 109] A. Repeat that.

Q. As you stopped which way were you headed?

A. South.

Q. Well, before you headed south were you headed north?

A. Yes. When I stopped underneath the bridge I looked to see where the Diesel was coming.

Q. Before you looked which way were you headed?

A. North.

Q. And what did you do in order to look?

A. Well, I had to turn around.

Q. And when you turned around then were you headed south?

A. Yes, then I was looking south.

Q. How long did you stand there before you determined the position of your Diesel?

A. Oh, about 30, 45 seconds maybe.

Q. Is that your best judgment?
A. That's my best judgment.
Q. Then after you determined where it was what did you do?
A. Then I proceeded, I started to walk.
Q. Now, when you started to walk, tell the Court and jury what happened?
A. I was bitten after I took a few, a couple of steps.
Q. You were bitten?
A. I was bitten.
Q. Where were you bitten?
[fol. 110] A. On the left leg above the knee.
Q. How do you know you were bitten?
A. Well, I know I was bit because I slapped my pants leg and crushed it.
Q. What do you think you crushed?
A. Well, it was something, some insect.
Q. Have you any idea—

The Court: What was that?
Mr. Dudnik: It was some insect.

Q. Have you any idea as to the size of that insect?
A. Well, it was the width of them three fingers, overlapped, these three fingers.
Q. These three fingers?
A. These three fingers and my thumb. I crushed it with my thumb and my three fingers.
Q. And did you feel it crush?
A. I felt it crush.
Q. What happened after you crushed it?
A. I straightened out my leg to make sure, I felt something going down my leg, you know, it would go down.
Q. And did you feel it go down?
A. I felt it roll down the back of my leg.
Q. Did you see it?
A. No, I didn't.
Q. Have you ever seen it?
[fol. 111] A. No, I haven't.
Q. Why didn't you see it after it went down your pant leg?

A. Because the Diesel was too close to me and I didn't have time to pick it up.

Q. What did you do then when the Diesel came at you?

A. Well, the Diesel come, I got on the Diesel, and I showed the man on the footboard, I asked him to look. I told him I had a bite.

Q. Did you feel any pain?

A. Yes, I felt it.

Q. Was it severe or slight?

A. Well, it was severe from the beginning and it eased up later.

Q. You say you showed it to the man on the footboard?

A. On the footboard.

Q. Who was that man?

A. I don't know who that man was.

Q. Did you at one time think you knew who it was, or did you never know who it was?

A. No, I didn't think I knew who it was.

Q. Do you remember now who it was?

A. No.

Q. Did he look at it?

A. He looked at it.

Q. Was that while you were on the Diesel?

[fol. 112] A. On the Diesel.

Q. Then where did the Diesel go?

A. We went to West Street.

Q. What did you do?

A. I got off the Diesel and went and looked the cars over.

Q. Did you continue your tour of duty?

A. I did.

Q. During the time that you continued your tour of duty, did you feel any sensation at the place where you had the bite?

A. Yes, I did.

Q. And where, again, was the place?

A. Above the knee on the back of my thigh.

Q. When did you next do anything about that particular bite?

A. Well, when we got to Clark Avenue I have a locker there and I went in and washed it off with soap, washrag and water.

Q. Could you see it?
A. No.
Q. When was it that you did that?
A. That was about 7:00 p.m.
Q. When did you eat, before or after?
A. After.
Q. And when did you eat that day?
A. About 7:15.
Q. Was that at your supper hour then?
A. Yes, it was lunch hour.
[fol. 113] Q. After you washed it and had your dinner, did you continue to work?
A. Yes, I continued to work.
Q. Did you finish your tour of duty that day?
A. I did.
Q. When did you finish?
A. At 11:00 p.m. that night.
Q. From the time you washed it until 11:00 p.m. were you conscious of any sensation in back of your leg?
A. Yes, I was.
Q. Were you conscious of the sensation when you went home?
A. I was.
Q. What did you do then when you went home?
A. Well, I asked my wife to look at it. She says that I was bit.
Q. Did you tell her what happened?
A. And I told her what happened.
Q. Did she describe it to you?
A. Yes, she described it.
Q. Were you alarmed about it?
A. No, I wasn't alarmed about it.
Q. What did you do that night?
A. I got in the bathtub, took a bath, and went to bed shortly after that.
Q. What did you do about it the next night, the next day?
[fol. 114] A. Nothing.
Q. Did it keep you from working?
A. No, it didn't.
Q. Were you conscious of a sensation?
A. Yes, I was.

Q. Did it ever leave you?

A. No.

Q. Did you do anything about it the following day, and the following day, say, for the next four or five days?

A. Well, for the next three or four days there was nothing done about it.

Q. Were you alarmed about it?

A. No.

Q. When did you first become alarmed about it?

A. When she told me it was forming like a boil.

Q. Like a boil?

A. Like a boil, and it was going to bust.

Q. Did it bust?

A. I got in the bathtub. I got in the bathtub and when I got out she told me that it busted.

Q. What did you do then?

A. Then, the only thing I had was carbolic salve. I put carbolic salve on it.

Q. Did you see a doctor?

A. Yes, the first off day I had, that was on a Thursday, [fol. 117] I went to a doctor.

Q. How many days after that, do you know, after the bust?

A. No, it wasn't but a couple of days.

Q. Who did you see?

A. Dr. Heller.

Q. What did Dr. Heller do for you?

A. Well, the first thing he gave me was a shot of penicillin.

Q. By the way, had Dr. Heller treated you before?

A. He was my family doctor.

Q. And do you recall some of the things he treated you for?

A. Yes, he treated me for my back, and that's about all I guess.

Q. Do you recall ever seeing him about your chest?

A. Yes.

Q. What was the incident that sent you, that got you to Dr. Heller with regard to your chest?

A. Well, I was working at DuPont Chemical at the time when an argument arose, and as I was eating a sandwich

I just happened to get into this argument, and I made a swallow and it seemed to have stuck in my chest.

Q. And that is what you went to see him about?

A. That's what I went to see him about.

Q. Was that cleared up?

A. That cleared up.

[fol. 116] Q. Now, Dr. Heller gave you a shot of penicillin the first time you saw him with relation to this bite, and did you see him again?

A. Yes.

Q. How long after that?

A. A day, the next day.

Q. Did you continue to work?

A. Yes.

Q. How many times did you see him altogether, do you recall?

A. About half a dozen times.

Q. Now, on the last time that you saw him what did he tell you?

A. He told me, he says, "I will have to put you in the hospital."

Q. What did you do?

A. Well, I went to another doctor.

Q. Who did you go to?

A. Ippolito.

Q. Dr. Ippolito?

A. Ippolito.

Q. How long after the last visit to Dr. Heller?

A. It was right after the visit.

Q. Did Dr. Ippolito examine you?

A. He examined me.

Q. Was your wife with you?

[fol. 117] A. She was.

Q. What did Dr. Ippolito say to you after he examined you?

A. He says, "You are going to the hospital."

Q. This time did you agree to go?

A. I went.

Q. How long after he said that to you did you get into a hospital?

A. The next day or two.

Q. And what hospital?

A. Marymount.

Q. By this time were you able to see any part of the sore on your leg?

A. No.

Q. What did Dr. Ippolito do for you in the hospital?

Mr. Dudnik: Am I in your way, sir?

Juror No. 7: No.

Mr. Dudnik: Thank you.

A. They took cultures and examinations.

Q. What did he do by way of treatment other than the examination and cultures?

A. He operated. Skin—

Q. How long—I am sorry, Jim?

A. Skin graft.

Q. Now, before the skin graft didn't he do something else?

[fol. 118] A. I don't remember.

Q. Do you remember?

A. I don't remember.

Q. Before the skin graft, Jim, may I ask you whether you recall that he did a debridement operation, which was cutting away of the flesh, do you recall that?

A. Yes, I recall that.

Q. Was that the first operation?

A. That was the first operation.

Q. How long after your first entrance to Marymount did you have that debridement, if you recall?

A. That was only a couple of days after.

Q. Did he put you to sleep?

A. Yes.

Q. And how did you feel afterwards?

A. Sickly.

Q. Now, after you got over the effects or whatever it was that put you to sleep, did you begin to feel anything about your leg?

A. Yes.

Q. What did you feel?

A. Pain.

Q. What kind of pain was it?

A. It was a sharp burning pain.

Q. Following that did you have a skin graft operation?
[fol. 119] A. Skin graft.

Q. Now, can you tell me how long between the debridement and the skin graft?

A. No.

Q. You can't?

A. No.

Q. What did he do by way of a skin graft, can you tell us?

A. No, I can't tell you. They just took skin off my right thigh and that's all I can say about it.

Q. Were you able to see the area that the skin was taken from?

A. Yes.

Q. Will you describe that?

A. It was raw.

Q. Was it sore?

A. It was sore.

Q. Could you tolerate it?

A. What?

Q. You had no trouble tolerating that pain, did you?

A. Well, yes, to a certain extent, it pained enough that I—

Q. That you knew it was there?

A. Yes.

Q. How about the area that the graft was made on, was that sore?

A. That was painful.

[fol. 120] Q. How long did you have that graft before any other surgery was done on you?

A. I don't remember. I can't, I don't remember.

Q. All right, Jim. You were in Marymount the first time about four months, were you not?

A. Right.

Q. During those four months did you have more than the debridement and the one skin graft?

A. Yes.

Q. What did you have?

A. Well, they were cutting away, and skin grafts.

Q. Were there several of those?

A. Yes.

Q. Were they painful?

A. They were.

Q. Was your leg, the site of the trouble, getting more painful, less painful, or did it stay at the same level of pain?

A. That was always painful, severe pain.

Q. Did they give you anything for pain?

A. I was taking demerol at the time.

Q. Demerol?

A. Yes.

Q. At the end of four months or so, or to be precise, on December 8th of 1954 you went home, and you were home [fol. 121] for about, oh, four days less than a month, were you not?

A. Yes.

Q. What did you do when you were home?

A. Nothing. I tried crutches once, and then I stayed in bed from then on.

Q. Could you get along with crutches?

A. No.

Q. Could you go to the bathroom?

A. No.

Q. Who took care of you?

A. My wife.

Q. During that period did she dress you every day?

A. She did.

Q. I mean the wound.

A. Yes.

Q. Tell me, what did you experience when the bandage was taken off?

A. Well, pain.

Q. Was it intensely painful?

A. Intensely painful.

Q. And was that every day?

A. Every day.

Q. What happened to the area that the doctors treated during that month, did it get better, stay the same or get worse?

A. It just kept getting worse.

[fol. 122] Q. Were you able to see it yet?

A. No, not yet.

Q. How do you say it was getting worse, I mean, can you explain what you mean by it was getting worse, Jim?

A. Well, one thing, the bandage, it came off, you could see the size, it was getting bigger in area.

Q. What was getting bigger?

A. This—

Q. This sore?

A. This sore, and there was more pain to it.

Q. Did you finally go back to the hospital, Marymount?

A. Yes.

Q. How long were you there the second time?

A. (No response.)

Q. Is about 15 months correct?

A. I was going to say about 14 months.

Q. Tell me about that 15-month stay in the hospital, Jim.

A. What is there to say?

Q. Will you keep your voice up? Are you getting tired?

A. I am getting tired.

Q. Would you like a little rest, Jim?

A. Yes.

The Court: We will have a very brief recess. You won't retire to the jury room. You may go out and get a drink of water and smoke a cigarette.

[fol. 123] Be ready to come back in a few minutes. Will you all assemble there. Are all 14 of you there? I just want to make sure that you are admonished not to talk to anyone while you are out in the hall there regarding this case.

(Thereupon a recess was had.)

The Court: Before you get started again, Mr. Dudnik, may I say to the ladies and gentlemen of the jury, as you have noticed I have cautioned you every time you leave the room whether it is for recess or the termination of the case at the end of each day, and every noon hour.

I want to further caution you, and I have cautioned you, and you have been cautioned during the impaneling of the jury, to be careful in reading newspapers and listening to comments on the radio or television or any other medium as it has to do with this case.

I caution you once more not to form any opinions from anything you read or see concerning this case.

You may proceed.

[fol. 124] By Mr. Dudnik:

Q. Jim, I asked you to tell us about the 15 months in the hospital at Marymount, and you said "What is there to say?"

Well, let me put it to you this way, to make it brief, did you have many surgical procedures there?

A. Yes.

Q. Did this infection spread?

A. Yes.

Q. Can you tell us to what parts of your body it spread?

A. Under my arm, my right side here on the back, and my ankle.

Q. Are you pointing to your left or right ankle?

A. Left ankle.

Q. Were you bandaged every day?

A. Bandaged every day.

Q. Were these areas running?

A. Running.

Q. Were they running with pus?

A. That's right.

Q. And how did the bandage, how did you feel when they bandaged you?

A. That was painful.

Q. How many operations did you have at Marymount?

A. I don't remember.

Q. You haven't any idea?

[fol. 125] A. No.

Q. Were you given narcotics for the relief of pain?

A. I was.

Q. Following the 15 months' stay at Marymount—by the way, during that time at Marymount was there an odor from those areas?

A. Yes.

Q. When did the odor begin?

A. Oh, some time after I went back to the hospital.

Q. And did that odor continue?

A. It did.

Q. Through the balance of the stay at the hospital?
A. It did.
Q. What kind of an odor was it?
A. Terrible.
Q. And was it all the time?
A. All the time.
Q. Now, then, on March 8th of 1956 you went home, did you not?
A. Yes.
Q. And you stayed home about four or five months, did you not?
A. Yes.
Q. How did you feel during those four or five months, Jim?
A. The same. Just painful. I was taking narcotic pills [fol. 126] for the pain.
Q. Could you sleep?
A. Off and on, I couldn't sleep.
Q. Was the pain getting more severe or did it stay at the same level?
A. I would say it was more severe.
Q. What was happening to those areas that were operated on during the time that you were at Marymount the second time?
A. They were getting larger.
Q. What was happening to those operated areas when you were home during those four or five months?
A. They were getting larger.
Q. Did the skin grafts take?
A. None.
Q. They did not take?
A. No.
Q. And did the sores open up again?
A. They opened up.
Q. Were there some that you could see, Jim?
A. There was, after, I could see it, yes.
Q. Could you describe it?
A. Well, I don't know how to describe it.
Q. Would you keep your voice up for me?
A. It was stringy, various color, running.
Q. Was it running from more than one area?

[fol. 127] A. Yes, it was.

Q. Now, then, on July 30th you entered the Cleveland Clinic?

A. Yes.

Q. And you were there

The Court: What year is this?

A. Of 1956. '56.

Q. Now, I hope I am right, you were a patient at Cleveland Clinic from July 30, 1956, to July 21, 1958, isn't that right?

A. That's right.

Q. A period of about two years?

A. That's right.

Q. However, there were some periods during that time that you were home?

A. Two or three I think. At one time I think I was home for four days.

Q. Four days and you went back?

A. Then I had to go back.

Q. What was the longest period that you were home away from the hospital during the two years at the Cleveland Clinic?

A. Four days.

Q. That is your recollection?

A. Yes.

Q. Now, then, when you got into the Clinic the first time what shape were you in, Jim?

[fol. 128] A. Physically I was in good shape.

Q. Good shape?

A. Good shape physically.

Q. What was the condition of your area, sore areas?

A. That was undescribable.

Q. Were you in pain?

A. All the time.

Q. What is the first thing they did for you by way of treatment at the Clinic?

A. I don't know what they done.

Q. You don't remember?

A. I don't remember.

Q. Did you have any surgery there?

A. Yes.

Q. How many times were you in surgery during the some two years or less that you were at the Cleveland Clinic?

A. I couldn't count them.

Q. Were there many?

A. Many.

Q. How did you feel after each of those surgical operations?

A. Well, sick, miserable.

Q. And were you getting better?

A. No.

Q. Or were you getting worse?

A. I think worse.

[fol. 129] Q. Did you have many skin grafts?

A. Yes.

Q. Did you have daily dressings?

A. Daily dressings, once or twice a day.

Q. Once or twice a day. I want you to tell me how you felt when they took the bandages off?

A. It was painful, and I screamed. I used to scream.

Q. What is that?

A. I used to scream, holler.

Q. Did they ever have to take you in surgery and give you a general anesthetic to take your bandages off?

A. They did.

Q. How many times?

A. Oh, many times.

Q. Many times?

A. Many times.

Q. Under a general anesthetic?

A. Yes.

Q. Why was that?

A. Because it was so painful.

Q. Was there an odor about those areas at the Clinic?

A. There was.

Q. Was it constant?

A. Constant.

Q. Jim, what happened in May of 1958?

[fol. 130] A. I lost my first leg.

Q. What happened three weeks later, Jim?

A. I lost my second leg.

Q. How did you feel, Jim?

Are you ready to continue?

A. Yes.

Q. Do you want to live, Jim?

A. I want to live.

Q. You were discharged from the Clinic or rather you left the Clinic on July 21, 1958, did you not, Jim?

A. '58, that's right.

Q. Where did you go from there?

A. Highland View.

Q. Are you still there?

A. I am still there.

Q. What are they doing for you, Jim?

A. Therapy. Whirlpool. That's all.

Q. Jim, are your stumps healed?

A. One is. The other isn't.

Q. Is it still running?

A. There is a drainage.

The Court: What?

Mr. Dudnik: There is a drainage, your Honor.

Q. Jim, are you a narcotic addict?

[fol. 131] A. No.

Q. Were you?

A. Yes.

Q. Do you still take things for your pain?

A. I do.

Q. Do you have to take it every day?

A. Every day.

Q. Jim, do you have an open wound anywhere now?

A. On my arm.

Q. I am going to ask your wife to take the dressing off, and I want you to exhibit it to the Court and jury. Will you help him, Mrs. Gallick?

Is it safe to do it?

Mrs. Gallick: Yes, it is safe to do it.

Q. Jim, I am going to turn this around. I want the jury to see this.

Can all of you folks see that?

Now, Jim, I am not going to ask you to show your stumps. But is that skirt up as far as it can go?

A. As far as it can go.

Mr. Dudnik: Can all you folks see that?

Q. Jim, were you visited by any claim agents of the Baltimore and Ohio Railroad?

A. I was.

[fol. 132] Q. When was the first time you were seen by a claim agent?

A. I don't remember when, but it was at Marymount Hospital.

Q. Marymount?

A. Yes.

Q. Will you keep your voice up. Was it during your first stay or your second stay?

A. My first stay.

Q. Your first stay?

A. First stay.

Q. Did you at that time give them a statement of some kind?

A. Yes, I did.

Q. Which you signed?

A. I signed.

Q. Who was there when you signed it?

A. Spinelli and Robinson.

Q. Spinelli and Robinson. Were they both claim agents of the railroad?

A. They were.

Q. Was there anybody there representing you?

A. No.

Q. When did you retain a lawyer in this case, Jim?

A. In '56.

Q. Some two years later?

A. Yes.

Q. And that was Mr. Cook—

[fol. 133] A. Cook.

Q. —who in turn was kind enough to retain me?

A. Right.

Q. Jim, did you keep a time book of every day that you worked?

A. I did.

Q. And does that show the shift you worked and the days you worked and the hours you worked?

A. Yes.

Mr. Dudnik: You have copies of this.

Q. I am going to hand you this book—mark it.

(Plaintiff's Exhibit 11 was marked for identification by the reporter.)

Q. It is marked Plaintiff's Exhibit 11; what is this, Jim?
A. It is the time book.

The Court: What?
Mr. Dudnik: Time book.

Q. I believe it has records starting in 19 what, Jim?
A. This is from April 16th.
Q. April 16th?
A. To the 31st.
Q. Of what year? What I mean is this, Jim, about how many years does this cover?
A. '51.
Q. '51?
[fol. 134] A. '51.
Q. Through the time you worked until you left work as a result of your accident?
A. Right.
Q. Jim, I am going to turn to the month of August of 1954. You have a word written there after the date August 10th, and what does that word say?
A. That says "Bug."
Q. When did you put that in there, Jim?
A. It was after when I was visited by Spinelli and Robinson.
Q. Was there any particular reason that you did it?
A. No, just to give me an idea of about the date.
Q. And you still cannot tell the jury with any certainty as to—
A. No.
Q. —as to the exact date?
A. No.
Q. It has been called to my attention that I may have overlooked asking you a question, Jim.
I want you to tell me whether or not on the day that you had the accident the ditch contained the things you described that were in it most of the time?

A. Yes.

Mr. Dudnik: You may cross-examine.

The Court: Ladies and gentlemen of the jury, in order [fol. 135] to give the plaintiff a little rest period, there will be another short recess.

Once more, when you go out of here and have a smoke and drink of water, remember the admonition not to talk about this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

Cross examination of James T. Gallick.

By Mr. Hadden:

Q. Jim, before I start out I just want to make it clear to you that I have no intention to make it any more uncomfortable for you than it already is, and if it becomes that way please let me know.

Jim, you say in 1954 you were living in Parma; how long had you been in Parma?

A. A year and a half.

Q. Year and a half?

A. Year and a half.

Q. Was this a new house for you?

A. This was a new house.

Q. You were doing some work around your place, weren't you?

A. Well, yes.

Q. You did some work on your garage?

[fol. 136] A. I painted it.

Q. And did you have a garden in the vicinity of your house?

A. No, no.

Q. But you did have a yard?

A. Yes.

Q. With a lawn?

A. With a lawn.

Q. During the summer of 1954 while you were doing the work of which you speak, did you ever have occasion to be out in your back yard with shorts on?

A. No, I never wore shorts.

Q. You never wore shorts?

A. No.

Q. Do you remember the date that you moved into your house in Parma?

A. No, I don't.

Q. It was in the year 1953, was it?

A. Maybe.

Q. You can't be sure?

A. No.

Q. What can you tell me, Jim, about the weather in the month of August, 1954?

A. Well, it was nice weather.

Q. It was nice weather?

A. Nice weather.

[fol. 137] Q. Can you recall at the present time ever having seen or heard any thunderstorms or any bad storms during that month?

A. No.

Q. Would it be fair to say that perhaps for three weeks or a month before your insect bite there had been no real heavy rains?

A. No, there was no heavy rains.

Q. Now, while you were on the Number 2 yard job or Seneca Street job during the month of August, Jim, I would like to get it a little more clear in my mind exactly what area it was that you had to work in.

As I understood it, you came to work every day at the Seneca Street yard office, is that right?

A. Yes.

Q. And that is located maybe a couple of hundred yards from the Columbus Road bridge?

A. Yes.

Q. Now, during the course of your ordinary working day on that job, how far to the north along the B & O tracks would you go?

A. To Whiskey Island.

Q. That is an island on the shore of Lake Erie, isn't it?

A. Yes.

Q. Right up as far north as you can go?

A. Yes.

[fol. 138] Q. How far south would you get?

A. To Clark Avenue.

Q. To Clark Avenue?

A. Not during the afternoons, though.

Q. Well, sometime every day you would get down to Clark Avenue?

A. Yes.

Q. And would that be at the south end of the Clark Avenue yards?

A. Yes, south.

Q. In other words, you would work in and around the yards also?

A. Where?

Q. Well, your work took you through the yards not just up to them?

A. We would take our cars to Clark Avenue, disconnect the engine and come back to the yard, switchman's shanty there, and go to lunch.

Q. In any event, your work did take you down to the Clark Avenue yards, that is right, isn't it?

A. Yes.

Q. Now, in the course of traveling back and forth along the B & O tracks between the limits that you have mentioned, you had to pass many industries on both sides?

A. Yes.

[fol. 139] Q. And you had to travel, it would be fair to say, wouldn't it, throughout the flats area?

A. Yes.

Q. What was your habit, Jim, so far as the clothes that you wore on the job in the summertime?

A. Like any other man. A shirt, trousers, and I always wore a 10-inch, that is 10 inches high, Chippewa shoe.

Q. 10-inch high Chippewa shoe?

A. Yes.

Q. That would come up above your ankle, is that right?

A. Yes.

Q. What can you say about your pants, were they the regular khaki pants that most people wear in the summertime?

A. Yes.

Q. And they came down to the top of your shoe, did they?

A. No, they came down to the ankle.

Q. To the ankle. Do you remember whether it was that sort of clothing you were wearing on the date that this insect bite took place?

A. It was.

Q. Did you have socks on?

A. Yes.

Q. What sort of socks were they?

A. They were cotton socks.

Q. How high up your leg did they come?

[fol. 140] A. I would say they were about 12 inches high. So they overlapped the shoe about 2 inches.

Q. I see. Were they turned down over the shoe top, or did they stick up?

A. No, they had elastic.

Q. They had elastic tops?

A. Yes.

Q. On the day of this insect bite, Jim, I would like to get a little more clear in my mind exactly what your movements were.

Please, again, if you begin to get tired, please let me know.

The Court: Are you tired now?

A. No.

Q. You reported to work as you said at the Seneca Street yard office?

A. At the yard office.

Q. I am not sure exactly what time you arrived on this particular day?

A. I would say around 2:00, which was regular for me.

Q. I understand you to say that it was regular that you arrived at 2:00?

A. Around 2:00.

Q. Now, Jim, do you recall in August of 1957 while you were a patient in the Clinic, that Mr. Dudnik and Mr. Nu-[fol. 141] renberg and myself and a court reporter came to see you, and we took your deposition?

A. Yes.

Q. Do you recall telling me on that occasion that your usual time of arriving on the job was 2:30 in the afternoon?

A. No, I don't.

Q. You deny that you said that, sir?

A. I don't remember saying it. But I still say it was 2:00.

Q. It is your opinion that 2:00 was the time rather than 2:30?

A. That's right.

Mr. Hadden: May I have a second or two, your Honor?

The Court: Surely.

Q. Jim, I am going to read to you a question and answer or two from your deposition, merely for the purpose of finding out whether this refreshes you on what was said back in August of 1957.

I asked you—

Mr. Dudnik: Page and line?

Mr. Hadden: That is Page 62.

Q. The question: "You are not able to say then where you have been or what you had done during the half hour or so that you had been working before you were stung?

"A. Yes. I was in the yard office a half an hour before [fol. 142] talking on the telephone.

"Q. You had been in the yard office?

"A. Yes.

"Q. And you came to the yard office at 3:00?

"A. Before, before 3:00. We generally get there around 2:30.

"Q. Around 2:30?

"A. 2:30.

"Q. And how long would you ordinarily be there?

"A. Well, we would get to work at 3:00. Get there at 2:30, get to the telephone, quarter to three or 3:00, and stay at the telephone 15 or maybe 20 minutes, and then go out and pick up the Diesel."

Now, Jim, does that refresh you on the questions and answers that we had?

A. Yes.

Q. And do you say it is true or not true that you got there at 3:00—excuse me, at 2:30 or at 2:00?

A. 2:00.

Q. You deny what you said at the deposition, then, is that right?

A. Yes.

Q. You were under oath at that time?

A. Yes.

Q. In any event, you got your orders from Clark Avenue [fol. 143] on the telephone, is that right?

A. That's right.

Q. How long did that take you?

A. What?

Q. To get the orders over the telephone.

A. Oh, 15 minutes, 20 minutes.

Q. Then did you proceed on to do your work?

A. Then we proceed out to do our work.

Q. What did you do during the other 40 or 45 minutes that you were in the yard office?

A. We have a locker there, sit in the shanty, loaf, talk.

Q. You loafed for 45 minutes, then you proceeded out to your engine, and I think you said that you left your lunch bucket and your lantern there, is that right?

A. Yes.

Q. On the engine?

A. On the engine.

Q. And you went to the spur yard?

A. Spur yard, Track 7.

Q. Track 7. If I am correct, Track 7 was a track which lay between the river and tracks leading into the freight station, freight house, is that right?

A. That's right.

Q. And how long were you there?

A. 10, 15 minutes.

[fol. 144] Q. And after having done your work there you proceeded where?

A. I waited until the Diesel was coming out. The Diesel passed me. Then I started towards the river track.

Q. Which way was the Diesel going?

A. The Diesel was going south.

Q. That is, back in the direction of Sherwin-Williams?

A. Sherwin-Williams.

Q. What was its purpose in going back there?

A. To throw the switch, so we go to West Street.

Q. Did you have anything to do with the throwing of the switch there?

A. No, I wasn't at that point at all.

Q. I see. So you went directly from the spur yard towards the Columbus Road bridge?

A. Yes.

Q. Now, Jim, I think when you were answering Mr. Dudnik's questions, you said when you got underneath the bridge you stopped?

A. I stopped.

Q. And how long is it that you say you stopped?

A. Oh, a half a minute.

Q. Half a minute?

A. Wait a minute. I didn't finish my question.

Q. Excuse me, I beg your pardon.

[fol. 145] A. Half a minute, maybe 45 seconds.

Q. What was the purpose of your stopping?

A. To see that the engine, the Diesel, was coming towards me.

Q. From the position that you stopped and turned could you see the Diesel?

A. Yes.

Q. Could you see it as far as the switch point where it had to back up and then come back towards you?

A. That's right.

Q. You could see that far?

A. That's right.

Q. What did the Diesel engine do while you watched it?

A. Threw the switch and he started back.

Q. That is, the switch was thrown and you saw him coming back?

A. Yes.

Q. Was it at that time that you felt the insect bite?

A. No.

Q. When was it?

A. When I seen the Diesel was coming back I turned around, started walking north, and I took a couple of steps when this insect bit me.

Q. It was shortly then, it was right after you had stopped and looked down the track, is that right?

A. (Witness nods.)

[fol. 146] Q. Can you give me some estimate of how long it was between the time that you turned back to continue your walking and the time you felt the bite?

A. I took about two steps.

Q. A matter of one or two seconds then perhaps?

A. Yes.

Q. In other words, at least a very short time?

A. Yes.

Q. At that point the Diesel engine had just started to move toward you, is that right?

A. No, he started to move towards me up until I watched him.

Q. Well—

A. And then I turned around and started walking north.

Q. The point I was getting at was whether you turned and started to walk as soon as you saw him begin to move toward you?

A. Yes.

Q. Jim, showing you Plaintiff's Exhibit 2, I will ask you to say what that is, if you can tell.

A. That is the ditch.

Q. Can you identify the track for me and what it showed at the time?

A. That is the river track.

Q. In which direction is that looking, is that looking back [fol. 147] towards where your Diesel was?

A. Yes. That is south, looking south.

Q. So if we give our attention then to the right hand side of this picture, that shows more or less the view that you had as you stopped and you say you turned around and looked towards your Diesel, is that right?

A. Yes.

Q. Now, can you tell me by looking at this picture whether the point of the switch is shown?

A. No.

Q. You can't see it?

A. No, I can't see it. That was taken on a curve angle.

Q. Jim, returning once again to the time two years ago when your deposition was taken, do you recall saying anything at that time either to Mr. Dudnik or to myself when we questioned you with regard to stopping and turning

around in the middle of the track for half or three-quarters of a minute?

Mr. Dudnik: There is an objection, your Honor, unless there is something in there as to whether he stated something differently. But whether he recalls, if the question wasn't asked there would be no question of recollection.

So there is an objection to that question.

Mr. Hadden: Your Honor, it is a perfectly proper question on cross-examination.

[fol. 148] Mr. Dudnik: Are you laying the foundation?

Mr. Hadden: I am.

Mr. Dudnik: I withdraw the objection.

The Court: Proceed.

Q. Do you have the question in mind or would you like to have it read, Jim?

A. Read it.

Mr. Hadden: Read the question, please.

(Last question was read by the reporter.)

A. I can't remember saying it.

Q. Jim, I want to read you a few questions and answers here.

Mr. Dudnik: The page, please?

Mr. Hadden: Page 24, towards the end, towards the bottom.

Q. Mr. Dudnik was questioning you at the time of these questions and answers, and I will read them.

"Q. Now, describe this incident in your own words, Jim.

"A. Well, I started towards West Street, and I was over in the spur yard first. I crossed Lime Road, started walking underneath the Columbus Road bridge when I got an awful bite on my left leg."

Do you remember those questions and answers?

[fol. 149] A. I do.

Q. Do you remember saying, Jim, that while you were walking under the Columbus Road bridge you got a sting?

A. Yes.

Q. Now, I am interested in the date of this accident.

Mr. Dudnik: Just a moment. If your Honor please, I now renew my objection to the question in which he said he was laying a foundation. The question wasn't asked. Therefore I renew my objection. The question was never asked whether he stopped or didn't stop on his deposition, and then I withdrew my objection when Mr. Hadden said he was laying the foundation, and I thought—

The Court: As I remember it, I think Mr. Hadden was reading from the deposition, and asked if the plaintiff remembered saying the language that was read from the deposition.

Mr. Dudnik: Yes, but I am talking about the objection before that.

The Court: I don't think we ever got an answer to it anyway.

Mr. Dudnik: All right, I am sorry I said anything. It is all right, your Honor. I mean by that I am not pressing the point.

The Court: I don't think there was an answer to that [fol. 150] question, because Mr. Hadden then went into the deposition and read from the deposition.

Mr. Dudnik: In other words, he asked him whether he remembers being asked anything about stopping under the bridge.

The Court: That's right, and there was never an answer to that.

Mr. Dudnik: And the witness said he didn't remember.

The Court: There was never an answer to that question, as I recall.

Mr. Dudnik: Then he did not read any question with relation to stopping under the bridge. There is no such thing in the deposition, as I see it, your Honor. That is why I am objecting to the question, because Mr. Hadden said he was laying a foundation apparently to show that the witness said something else on his deposition. As a matter of fact, he did not, your Honor.

Mr. Hadden: Well, that is just the point, your Honor.

The Court: The last question and answer may stand.

Q. Mr. Gallick, with respect to the insect which bit you, [fol. 151] or which you claim bit you, as I understood it, you

felt a stinging sensation behind your left leg inside your pants, is that right?

A. I felt the bite.

Q. You reached down with your left hand and you grabbed an object inside your pants?

A. Right.

Q. With the first three fingers of—

A. Three fingers.

Q. Of which hand?

A. Of the left hand.

Q. Of the left hand?

A. And the thumb.

Q. And the thumb?

A. Yes.

Q. And you squeezed it?

A. I squeezed it.

Q. Now, you said you heard a—

A. A crack.

Q. Did you hear the crack or feel the crack?

A. Both.

Q. Can you describe with somewhat greater accuracy how big around it was?

A. Well, I would say about as big around as my little finger.

Q. As big around as your little finger?

[fol. 152] A. Yes.

Mr. Hadden: May we have the record show that is maybe half an inch in diameter?

Mr. Dudnik: Call it any way you want.

Q. Would you hold your hand up again so I can see what your three fingers look like?

An inch and a half to two inches long?

A. Two inches.

Q. Two inches. So in your best judgment, whatever it was that was under your pant leg was about two inches long and perhaps half an inch in diameter?

A. (Witness nods.)

Q. Perhaps the size of a peanut, would that be?

A. I think a peanut is a little bigger.

Q. A little bigger?

A. Yes.

Q. You have never described it in that way, have you?

A. No.

Q. And you felt it roll down your pant leg?

A. I did.

Q. When it rolled down your pant leg, can you give me any estimate of how long that was after you had turned around and started to walk towards West Street?

I understood you to say two to three seconds, or two [fol. 153] seconds, to be more exact, between the time you started to turn—

A. Yes, I took a couple of steps.

Q. —that you slapped your leg?

A. Yes.

Q. And then immediately the bug rolled down your pant leg?

A. After I slapped it, it rolled down my leg.

Q. So that the time lapse from the moment you started to walk back in the direction that you had started out, and the time this insect rolled down your leg, if that is what it was, was maybe five seconds, is that a fair statement?

A. No, it would be longer than that.

Q. It would not be?

A. It would be.

Q. It would be. How long would it be?

A. From the time I turned around and started walking north, I would say it would be closer to between 30 and 45 seconds.

Q. I want to make sure you understand the question, and that is after you had stopped and looked around, you say from the time that you then turned to go back, took two steps, slapped the insect and it fell down your pant leg, that was 30 to 40 seconds?

A. Yes.

Q. What can you tell me, Mr. Gallick, about the condition of this pool as you described it, over the years that you [fol. 154] worked there? If I got your direct testimony correctly, you worked for the B & O and had occasion to be under that bridge for something like ten years, is that right?

A. Off and on, yes.

Q. Off and on?

A. Yes.

Q. And for the last four—

A. Four years.

Q. —quite regularly?

A. Regularly.

Q. Would it amount to more than once a day sometimes?

A. Yes.

Q. If you went through one way, you had to come back again, didn't you?

A. Yes.

Q. So it would be twice a day, at least twice a day?

A. Yes.

Q. Now, during this period of ten years that you saw it occasionally, and four that you saw it regularly, was the condition so far as insects, stagnant water, and the like, the same?

A. It was.

Q. That is to say, it got neither worse nor better in the given time that you had to be there?

A. It was always filthy.

[fol. 155] Q. Please answer the question. It neither got better nor worse during the time that you had occasion to see it?

A. No, it got no better or no worse.

Q. And that condition was filthy as you described it?

A. Yes.

Q. Exactly what do you mean by the word filthy?

A. Filthy is part rotted hides of dead pigeons, dead rats, dead insects, flying in and around that area.

Q. And by that area do you mean the area directly under the bridge or some larger area?

A. That area under the bridge and other.

Q. And some other area, also?

A. Yes.

Q. What area was it in addition to the part of the bridge?

A. South of the bridge.

Q. South of the bridge?

A. And north of the bridge.

Q. Both south and north of the bridge?

A. Yes, sir.

Q. Taking the north part first, how far to the north of the bridge did this condition prevail?

A. Oh, I would say about 50, 75 feet.

Q. Was it restricted in that area to the east side of the tracks?

A. Yes, mostly.

[fol. 156] Q. Well, there was no water on—

A. No.

Q. —on the west side of the tracks, was there?

A. No, there wasn't.

Q. How about to the south of the bridge, how far—

Mr. Dudnik: Didn't he say south—wasn't that south, or north?

Mr. Hadden: North.

Mr. Dudnik: I am sorry.

Q. How about south of the bridge, how far did the area extend in that direction?

A. That was covered with dead rats and rotted hides.

Q. Maybe you didn't understand the question. The question was how far did that area extend?

A. All the way to Sherwin-Williams.

Q. All the way to Sherwin-Williams. And how great a distance would that be?

A. About 200 yards.

Q. When you say Sherwin-Williams I take it you mean the first part of the Sherwin-Williams buildings, or did it go beyond that?

A. The first part.

Q. The first part?

A. To their overhead bridge.

Q. To their overhead bridge; that is an overhead bridge [fol. 157] that crosses over the river track and goes between two parts of their plant?

A. That don't cross over the river track.

Q. Well, it does go between—

A. It crosses over the east and west—the main track there, what we call the main track.

Q. That is not the river track down there?

A. No.

Q. When you say that this area extended that far to the south, what exactly do you refer to, do you refer to a wide area or to a narrow area?

A. The width of the tracks.

Q. The width of the tracks. Is that to say, then, that these insects, rats and other things were on the tracks, or that it was just the width of it?

A. What do you mean on the tracks or the width of it?

Q. You said the width of the area that extended down to Sherwin-Williams was the width of the tracks. Now, I am trying to find out whether you mean to say that that was the area, the tracks are the area that had the filth on?

A. Our right-of-way.

Q. It was the width of the tracks, and the things that you described were on the tracks themselves, then?

A. Yes.

Q. Can you give us any estimate of how many dead [fol. 158] pigeons you may have seen on any given occasion right under the Columbus Road bridge?

A. Under the Columbus Road bridge?

Q. Yes, the place where you say you were bitten?

A. Well, I never counted them.

Q. Well, was it one?

A. Oh—

Q. Was it five thousand?

A. No. I would say twenty.

Q. Twenty?

A. Or more.

Q. Twenty or more, and when you say twenty do you mean that those were dead pigeons?

A. Dead pigeons or dying pigeons.

Q. Was there ever a time that you can remember when there were fewer pigeons than that?

A. Yes.

Q. When was that? I thought this condition remained pretty constant from what you told me?

A. Well, I never, just like I say, I never counted them.

Q. Am I now to understand there were times when there were fewer?

A. Yes.

Q. Can you give me some estimate of how many dead pigeons, dead or dying pigeons you may have seen?

[fol. 159] A. Oh, say twenty or thirty.

Q. Is that the fewest you ever saw?

A. Yes.

Q. Are you getting tired?

A. I am getting tired.

Q. Well, then let's suspend, may we, your Honor?

(Counsel and the Court conferred at the bench.)

The Court: Ladies and gentlemen of the jury, the bailiff will adjourn Court for the day in just a moment.

Before he does, you will remember there will be no Court tomorrow, and you will report back at 9:15 Monday morning, once more with the admonition that you do not talk with anyone about this case, not even amongst yourselves.

(Thereupon an adjournment was taken to 9:15 a.m. Monday, June 15, 1959, at which time the folowing proceedings were had:)

[fol. 160] Monday morning session, 9:15 a.m., June 15, 1959

The Court: Ladies and gentlemen of the jury, by agreement of counsel on both sides, we are to take the testimony of two witnesses out of order before we complete the cross-examination of the plaintiff.

You will remember when we adjourned last Thursday the plaintiff was being cross-examined by defense counsel.

At this time I understand the plaintiff is calling two other witnesses; is that right?

Mr. Dudnik: Yes.

Mr. Leasure: Yes.

Mr. Dudnik: Dr. Heller.

Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness DR. JACOB R. HELLER, who, being first duly sworn, was examined and testified as follows:

Direct examination of Dr. Jacob R. Heller.

By Mr. Dudnik:

Q. Dr. Heller, will you state your name in full, please?
A. Jacob R. Heller, H-e-l-l-e-r.
[fol. 161] Q. Where do you live, sir?
A. 3000 West Sulgrave Oval, Shaker Heights.
Q. Are you a licensed practicing physician in this community?
A. I am.
Q. Where did you take your medical training, Doctor?
A. Ohio State University, West Virginia University.
Q. When did you graduate?
A. 1928.
Q. Following that did you intern in any hospital, sir?
A. I did.
Q. Will you tell us where?
A. St. John's Hospital, Cleveland, Ohio.
Q. How long did you intern at St. John's?
A. One year.
Q. Following that what did you do, Doctor?
A. I went into active general practice.
Q. And have you been actively engaged in the general practice of medicine since 1929?
A. I have.
Q. And has all that time been in Cleveland?
A. It has.
Q. Doctor, are you associated with any hospitals in this community?
A. I am.
Q. What are they?
[fol. 162] A. Polyclinic Hospital.
Q. Doctor, do you operate a clinic of your own?
A. I do.
Q. What is that known as?

A. Industrial Emergency Hospital.

Q. Doctor, I will ask you if you are acquainted with the plaintiff in this case, Mr. James Gallick?

A. I am.

Q. How long have you known him profesionally?

A. About 15, 20 years.

Q. Do you recall when you first treated him professionally for anything?

A. Exactly I don't remember.

Q. Doctor, I believe I asked you to check all the records that you have on Mr. Gallick for me, did I not?

A. Yes.

Q. And did you check them and take them all out?

A. I did.

Q. And did you give them to me?

A. All those I had available.

Q. The records consist of six cards, do they not?

A. Yes.

Q. Do you have any other records with regard to Mr. Gallick other than what I have here?

A. None that I could locate.

[fol. 163] Q. Doctor, according to your records when is the first time that you saw him, according to the records that you have?

A. January 2, 1950. That is, I didn't see him, but he was in the office at that time.

Q. Now, according to this record of January 2, 1950, you did not see him?

A. No.

Q. Did somebody else in your office see him?

A. Yes.

Q. Who was it, if you know?

A. It may have been my nurse or one of my associates.

Q. I see. What does this record show was wrong with him?

A. He evidently had complained of some back disorder, and he had been rendered diathermy treatment, and he was to return for me to see him. But there not being any other notation, he did not return.

Q. Does that record show a history as to what happened to cause him a back discomfort?

A. No.

Q. Do you know what happened to cause him the back discomfort?

A. No.

Q. Now, Doctor, according to the second record which you have, when did you next see him?

A. December 4, 1950?

Q. Does that record indicate what you saw him for?

[fol. 164] A. Yes.

Q. And what does it state?

A. Bruising and contusion of the right thigh. Ruptured muscle fibers, with interstitial hemorrhage.

Q. And does that record indicate what you did for him, Doctor?

A. Yes.

Q. Will you tell the jury what it was?

A. Heat, support, immobilization.

Q. What do you mean by immobilization?

A. Keeping the part quiet.

Q. Does that record indicate how many times you saw him for that condition, Doctor?

A. Yes.

Q. Will you tell us how many times you saw him?

A. About 20 times.

Q. When was the last time you saw him, Doctor?

A. It would be January 22, 1951.

Q. I take it then you saw him over a period of approximately two months?

A. Approximately, yes.

Q. Now, according to your records, when was the next time that you saw him, Doctor?

A. March 10, 1951.

Q. Does your record show for what condition you saw [fol. 165] him on March 10 of '51?

A. Pain in the chest and down his left arm.

Q. Did he give you a history as to how this happened?

A. Pardon?

Q. As far as those records show?

A. None that I recollect.

Q. And you recollect no history?

A. No history.

Q. What did you do for him, Doctor?

A. I examined him and gave him a sedative.

Q. How many times did you see him for that condition?

A. One time. Incidentally, he was told to come back, which he didn't, either.

Q. He did not come back?

A. No.

Q. Now, Doctor, the next time that you saw him according to your records was when?

A. February 23, 1952.

Q. Do you know what he was seen for, or for what complaint he was seen at that time?

A. Well, I have no notation here, but from—

The Court: What year was this, February 23rd.

A. 1952. From the treatment rendered, he was probably, he had a cold.

[fol. 166] Q. How many times did you see him for that condition?

A. Once.

Q. Now, Doctor, when was the next time you saw him?

A. January 31, 1953.

Q. Does that record indicate what you saw him for?

A. From the method of treatment rendered, probably it was a complaint of weakness.

Q. Do you know what type of weakness?

A. No, not particularly. Perhaps just generalized. The ordinary complaint of feeling out of sorts.

Mr. Leasure: I think I will object to that. The doctor said he doesn't know. I object to the theorizing on the part of the witness.

The Court: The latter part of the doctor's statement will be disregarded by the jury.

Q. I take it, then, Doctor, you don't know what his complaint was?

A. No.

Q. And you have no independent recollection of what it was?

A. Not specifically.

Q. All right. How many times did you see him, Doctor?

A. Once.

Q. Once or twice?

A. Once.

Q. Now, Doctor, when is the next time that you saw Mr. [fol. 167] Gallick?

A. August 26, 1954.

Q. Does your record show a history of any kind that he gave you?

A. No.

Q. Do you know what you saw him for?

A. He had an infection, boil-like type of raising on his leg.

Q. Doctor, did he give you a history of how he got it?

A. I have no recollection. I made no note of it if he did.

Q. In other words, you don't know anything about how he sustained this infection?

A. No.

Q. Nor do your records show it?

A. No.

Q. Nor do you have any independent recollection?

A. I do not.

Q. Can you describe the condition, if you recall it, when you saw him on August 26 of 1954?

A. It was a boil-like type of infection, raised off the skin, about the size of a quarter to half a dollar, and it was sort of weeping in character.

Q. Weeping in character?

A. Yes.

Q. What do you mean by weeping, Doctor?

[fol. 168] A. A slight drainage was just pouring out of the head of it.

Q. What did you do for him on that occasion?

A. I told him to apply heat. I gave him a sulfa ointment dressing and a penicillin injection.

Q. You gave him a dressing and an injection?

A. Right.

Q. When did you see him the next time, Doctor?

A. August 28th.

Q. What did you do for him on that occasion?

A. I redressed the infection and gave him another shot of penicillin.

Q. When did you see him the next time, Doctor?

A. September 2nd.

Q. Of '54?

A. '54.

Q. What did you do for him on that occasion?

A. Redressed the wound, but gave him no injection.

Q. When was the next time you saw him, Doctor?

A. September 7th.

Q. Of 1954?

A. Yes.

Q. What did you do for him on that occasion?

A. Redressed the wound and gave him an injection of dihydro-streptomycin.

Q. What was the appearance of that infection? Was that [fol. 169] the last time you saw him, Doctor?

A. The last time.

Q. What was the appearance of that infection the last time you saw him?

A. It wasn't responding to treatment.

Q. What do you mean by the fact that it wasn't responding to treatment?

A. It had the appearance of getting a little bit larger. It hadn't receded. The drainage had not become softer or more liquefying.

Q. Did you at that time recommend any further treatment for him?

A. I told him that under the conditions, my own impression at the time was that inasmuch as it wasn't responding, that we ought to look into this further, and I recommended that he ought to be hospitalized for further investigation.

Q. Did he come to see you following that recommendation?

A. I have not seen him since.

Q. You have not seen him since?

A. No.

Q. Doctor, according to this record, you have a legend here—withdraw that.

Will you read me the legend on this record right below the name?

A. Well, I-n-f, that stands for infection. R, right, and [fol. 170] leg.

Q. Doctor, you have here infection right leg. Do you have an independent recollection of whether it was his right or left leg, Doctor?

A. I do not.

Mr. Leasure: What was the answer?

(Last answer read by the reporter.)

Q. When you saw him and during the time you treated him, did he have one or more than one area of infection?

A. Just one.

Q. If the hospital records show that the area of infection was the left leg, Doctor, how would you account for it?

Mr. Leasure: Just a moment. I think I will object to that, your Honor. It is argumentative and asking this witness to speculate.

The Court: The objection will be sustained.

Juror: I didn't hear that.

The Court: What is that? Did you hear the objection? You didn't hear the question or the objection?

Mr. Dudnik: I think, your Honor, they had the question but not—

The Court: You heard Mr. Dudnik's question?

[fol. 171] Juror: Yes.

The Court: But you did not hear the objection. There was an objection raised by Mr. Leasure, and the Court has sustained that objection.

Q. Doctor, I note from your records beginning with the very first one, the card says Gallick, J.J.

The second one says Gallick, James. The third one says Gallick, Mr. John.

The fourth one says Gallick, James. The fifth one says Gallick, J.

And the sixth one, the last one, says Gallick, John.

Doctor, was that one and the same man?

A. It was.

Q. Can you account for the discrepancy in the names, Doctor?

A. No, except that he responded to both names.

Q. And is that why you put a different name, the name John on one card and James on the other?

A. Yes.

Q. Do you know what has happened to Mr. Gallick since?

A. Except only what I have heard from his wife and from you.

Mr. Dudnik: You may cross-examine.

[fol. 172] Cross-examination of Dr. Jacob R. Heller.

By Mr. Leasure:

Mr. Leasure: Did you have those cards marked that you were referring to?

Mr. Dudnik: No.

Mr. Leasure: I think we better have these marked so the record at some time will show what has been referred to here.

Mr. Dudnik: Would you keep them in order. You can mark them Plaintiff's exhibits.

Mr. Leasure: Well, they are not in order. I will get them in order. Mark them Defendant's exhibits.

(Defendant's Exhibits A, B, C, D, E and F, the cards referred to, were marked for identification by the reporter.)

By Mr. Leasure:

Q. Doctor, you testified about some treatment of Mr. Gallick on March 10th, 1951. Is this the card you had in mind when you testified about that? I am handing you Defendant Exhibit C, I believe it is.

A. Yes.

Q. Yes. I notice at the top of that it appears to be Mrs. John Gallick. Will you check that?

A. Well, it might have been, but it was for him.

[fol. 173] Q. You think it was for him?

A. Yes.

Q. Well, does it say Mrs. John Gallick at the top?

A. It could be interpreted that way. But you know doctors' handwritings.

Q. That is my problem.

A. Yes, mine, too, sometimes.

Q. That is our constant problem, doctors' handwriting. Well, in any event, Defendant Exhibit C does relate to Mr. John Gallick?

A. Yes.

Q. And not Mrs. even though it may appear Mrs. at the top, is that correct?

A. Yes.

Q. All right. Now, doctor, on August 26 you stated that you saw and treated Mr. Gallick. Is Defendant's Exhibit F the card that you prepared on that occasion?

A. Yes.

Q. All right. Doctor, from the cards that you have here, which you have testified about, about treatment of this patient and your records prepared in consequence thereof, I take it that your usual procedure at your office, at least, is to make out one of these three by five cards when the patient comes in?

A. Yes.

[fol. 174] Q. Is that correct?

A. That's right.

Q. Then if he comes back for repeat visits for the same problem, you make subsequent entries on the same three by five card, is that correct?

A. Sometimes. Sometimes it is recorded on a ledger sheet which the nurse transcribes.

Q. You mean then no entry would be put on the card?

A. Oh, yes.

Q. If it is put on the ledger sheet?

A. It would. Sometimes it might not.

Q. So we can't be sure that these cards are complete here, is that the idea?

A. Well, they are complete as far as whatever knowledge I have about treating him, yes.

Q. Well, I don't get the distinction between putting an entry on one of these cards, and putting it on the ledger sheet. Will you explain that?

A. You asked me my procedure of what happens—

Q. Yes.

A. —in a general way, meaning that sometimes it could happen as the secretary transcribes she may omit a name, or may omit a notation, transcribing from the ledger sheet to that.

Q. Let's take this Defendant's Exhibit F, the card for [fol. 175] August 26, 1954. Whose handwriting appears on that, Doctor?

A. That is my handwriting.

Q. All of it?

A. All of it.

Q. Can we be sure or can't we be sure that all of the visits that Mr. Gallick paid to you following August 26, 1954, appear on this card?

A. Well, sometimes patients will call. Sometimes they will come in and we make no notation.

Q. So we can't be sure that this is complete then, is that it?

A. Well, as far as that, as pertains to that particular condition, I would say it is complete.

Q. Well, I still don't get your distinction between what you put on here and what goes into some other record.

A. No, nothing goes into any other record except what is on there.

Q. You mean the ledger sheet is made up from this?

A. I have an Industrial practice and a private practice. Once in a while when the nurse will take care of a private patient she will make a notation on the ledger sheet which is the Industrial sheet. The secretary, thinking perhaps that I have made a similar notation on the card, will omit it. Whereas, I may have thought that she put it on, and in that way it gets missed.

[fol. 176] Q. There are some omissions, then, is that it?

A. It could happen.

Q. Now, have you looked over your ledger sheet for visits by Mr. Gallick?

A. No.

Q. So you don't know what that might show?

A. No.

Q. Now, when a patient comes in to you for the first time on a particular condition, even though he might have been a patient previously, do you make up this three by five card at the time he is there ordinarily?

A. Ordinarily, yes.

Q. So that it is made at the time you obtained your knowledge?

A. That's right.

Q. Or—

A. When I first seen him.

Q. And rendered your treatment?

A. That's right.

Q. When a patient comes in with a history of having suffered an accident, or some unusual occurrence which has led to his condition, you ordinarily put that down, don't you?

A. If it is something unusual.

Q. Well, accidents you consider unusual, don't you?

[fol. 177] A. Yes.

Q. And you put what you call a history of that down on your card here, don't you?

A. That's right.

Q. If it is anything that may help you in your treatment, or your diagnosis of the patient, you put that down on your card for reference, don't you?

A. I do.

Q. I notice on this one card here for December 4, 1950, Defendant's Exhibit B, which you testified to as involving a rupture of the thigh muscle, you put down a history on that one, didn't you?

A. Yes.

Q. Namely, jumping off of locomotive, and hurt right thigh, you made that entry, didn't you?

A. Yes.

Q. You thought that was important, didn't you?

A. Yes.

Q. Now, is this a fact, Doctor—I think we can shorten it this way—is this a fact that in so far as your record shows, and in so far as your knowledge or your recollection is concerned, it appears that Mr. Gallick came to you on August 26, 1954, suffering from an infection of the right leg, isn't that correct?

A. Yes.

[fol. 178] Q. And there is no history or no statement of events on your card which would indicate that either he did not relate anything to you about how that came about, or you did not think it significant medically, is that correct?

A. That's correct.

Q. Now, you described this condition that he had as a boil-like thing. Do you have a specific personal recollection of that, Doctor?

A. Well, in a general way I do.

Q. You mean you are relying on your own memory now and not the fact that you had something entered on a card, is that correct?

A. No, from memory.

Mr. Dudnik: Keep your voice up, Doctor.

A. I am sorry.

Q. I want you to tell us all you can about the exact appearance of that boil-like thing at the time he first came to see you on August 26th I think it was, 1954?

A. It had the appearance of a typical boil, raised off the skin, intergraded, red, firm base. The head of it was a little bit open. There was a little weeping discharge, as I related previously. And it was tender.

Q. All right. Is that the extent of your medical description of it?

[fol. 179] A. Yes.

Q. Now, the term boil, is that a medical term?

A. Well, not especially.

Q. What is the medical name for a boil?

A. Infection. Infected process.

Q. How about a furuncle?

A. That is not a boil. That is a small infected pimple.

Q. Which may grow up to be a boil, is that it?

A. That's right.

Q. Now, you see many boils, or boil-like appearances on people's skin, I assume from time to time, do you?

A. I do.

Q. Has it been your experience that the usual history or the typical history given by the person is that, well, I had a pimple there and it got bigger or something to that effect, it got yellow on top?

A. It could be one of several ways if they do happen to tell you.

Q. All right, if they do happen to tell you. Well, let's not speculate then. I take it, Doctor, when this man first saw you there was nothing to distinguish the condition of

his leg medically from an infection that comes about through the infection of a hair follicle, something of that kind?

A. The first visit, no, but the—

[fol. 180] Q. All right.

Mr. Dudnik: Just a moment. Let him finish.

A. But the third or fourth sort of made me suspicious that it wasn't acting in the ordinary way that the ordinary infected process does respond.

Q. You mean it wasn't responding to treatment in the way that they ordinarily do?

A. Yes.

Q. Now, did you at any time during your attention of this man take a smear of this infection and have any culture made of it?

A. That is not the usual procedure.

Q. Well, you did not do it?

A. No.

Q. So you can't say what type or kind of infection was there, I assume?

A. Oh, I could.

Q. Well, what is the usual procedure when you want to find out what exact infection is involved, don't you make a smear of it and have a culture made?

A. No, not generally at first, because the characteristics of the infection will indicate to the doctor what type of organism is usually involved.

Q. That is the general type?

[fol. 181] A. There are two general types which are the staphylococcae or the streptococcae.

Q. Those are the two general types of infection on the skin?

A. Infected organisms, yes.

Q. As a matter of fact, that is the usual type of infection, not only of the outer skin but sore throats and things of that kind?

A. Well, then you become involved with the pneumococcae and with any of the other types.

Q. You mean with a sore throat you can have a bigger choice?

A. Yes.

Q. But on the outer skin it is usually streptococcae or staphylococcae?

A. That is the most prevalent.

Q. As a matter of fact, could you tell from looking at this man's condition as to what type of bacteria was the infecting agent here?

A. Yes, to a certain extent.

Q. To a certain extent, what do you mean by certain extent?

A. Well, a staphylococcic type of infection produces a boil-type of reaction in a person. A streptococcic type of infection does not produce that. The streptococcic type of infection is one that usually gives you the appearance of blood poisoning. You see a very small pimple-like or pune- [fol. 182] ture of the skin, with red streaks up the arm, and a great deal of systemic involvement. The staphylococcic type of infection at first is localized.

Q. It is localized and doesn't run a red streak?

A. Yes.

Q. And it doesn't look like it is getting into the system, is that about it?

A. Yes.

Q. What appearance did this have to you, if you recall?

A. I would say it was a staphylococcic type at the beginning, my first impression.

Q. So it was localized?

A. Localized.

Q. Let's see now. You gave this man a shot of penicillin on the first visit, as I recall it; is that correct? Do you want to look at your card here?

A. Yes, penicillin.

Q. Penicillin and some kind of ointment?

A. Sulpha ointment.

Q. Sulpha ointment and heat. You mean you applied the heat at your office?

A. No. Heat in the sense we told him to soak it, and put on sulfate or epsom salt compresses.

Q. And the purpose of that is to bring it to a head?

A. To bring it to a head.

[fol. 183] Q. And make it break?

A. Yes.

Q. You wanted it to break?

A. To localize it, to keep it from spreading, and also to heal.

Q. And the sulpha and the penicillin is to attack the bacteria that are infecting, is that correct?

A. That's correct.

Q. That is the usual and ordinary type of treatment for this type of skin infection?

A. It is.

Q. This type of treatment has nothing to do with an insect bite per se, does it?

A. Well, at first, that wouldn't enter into it at all.

Q. That wouldn't enter into it at all. There was no appearance here that led you to believe that he was suffering from any kind of insect poison or toxin, was there?

A. None at all.

Q. It just looked like an ordinary skin infection?

A. Yes.

Q. Now, at any time while he was under your care, Doctor, did he show any signs or symptoms of suffering from any insect poisoning or toxin?

A. None that was apparent to me.

Q. None apparent to you, all right. Were the signs and [fol. 184] symptoms present in his case the usual ones accompanying a localized skin infection?

A. Pardon me?

Mr. Leasure: Read the question.

(Question was read by the reporter.)

A. Yes.

Q. And these skin infections can come about in many different ways, can't they, Doctor?

A. They can.

Q. As a matter of fact, the staphylococcus which you mentioned is a kind of bacteria that is usually upon a person's skin; isn't it, on the outside?

A. Yes.

Q. It could well be on this table top right here, is that correct?

A. In the air. Any place.

Q. In the air, the floor, anything we touch?

A. Correct.

Q. It is just all about us, all the time?

A. Correct.

Q. We are subjected to it in everything we do and every place we are, isn't that correct?

A. That's right.

Q. It can come about from—well, let me ask you this. [fol. 185] Doctor, isn't it a fact that the skin, normal healthy skin, has openings all over it in the nature of pores?

A. The openings are protected.

Q. Protected to some extent, yes, but they are openings, aren't they?

A. Yes.

Q. Have you known cases where a sweat pore becomes plugged up and becomes infected?

A. Oh, yes.

Q. That often happens, doesn't it?

A. Yes.

Q. Or around a hair follicle an infection will develop?

A. That could be.

Q. That could be, too. So there doesn't have to be any break in the outer skin for skin infection to develop, is that correct?

A. Well, there has to be a break. Perhaps not, one that is apparent—let me explain.

Q. Well, let me ask you.

Mr. Dudnik: Just a moment. Your Honor, may I ask that the witness be permitted to answer?

Q. Go ahead.

The Court: He may complete his answer.

[fol. 186] Q. Go ahead. It just wasn't responsive, that's all.

A. There has to be—

Mr. Leasure: How do you know? Are you testifying?

The Court: Let the witness testify.

Mr. Dudnik: He is a competent doctor, that is how I know.

A. There has to be a break. Most breaks aren't apparent to the naked eye. As long as there is a microscopic break. Microscopic break in the natural barriers of the body which resists the infected processes, to which we are daily subjected. Once you get a break, then the invading organism takes hold.

Q. Then—I am not sure, I don't know whether you are making a distinction or not, and I want to find out—do you classify the infection of a hair follicle or a sweat pore as constituting one of the breaks in the skin that you referred to?

A. Well, breaks in the tissue. I would not say skin. But breaks in the tissue. And skin is tissue just as mucous membrane is tissue.

Q. Will you answer my question? I am trying to find out, Doctor, whether you are classifying sweat pores and hair follicles as openings in the skin which would constitute in your language breaks in the skin?

[fol 187] A. I don't follow your differentiation there.

Q. Well, let me ask you this question: If it takes a break in the skin, even microscopic, for a staphylococcic infection, let's say, how does a hair follicle or a sweat gland become infected?

A. Well, it is hard—if I could draw it I could show you.

Q. Well, does that constitute a break in the skin or an opening in the skin?

A. You see, you have your skin and the hair follicle, or the sweat gland, let's say, hangs like a grape, to an enlargement.

Q. Underneath the skin?

A. Underneath the skin. Well, that lining is a mucous lining. That is made up of cells which resists the normal invasion of the surface organism. When you get a break in that tissue, whether it is a breakdown from external, due to some trauma, or from internal due to some disease, then this invading organism or this ever-present organism, which is the streptococcae or the staphylococcae, makes itself at home and then the infected process starts.

Q. So that you say the hair follicle and the sweat glands do constitute, call it a depression?

A. Yes.

Q. You could call it an opening, couldn't you, with your soft—what kind of material did you say it was?

[fol. 188] A. It is a mucous membrane lining.

Q. Mucous membrane like you have in your mouth?

A. That's right.

Q. And these organisms can get a hold in that material?

A. Yes.

Q. And also not only from a traumatic break in the skin, even microscopic but also from an unhealthy condition of the skin, that can provide sufficient basis for the infection to start, did I understand you correctly on that?

A. Yes, it could.

Q. So there are literally many many ways in which a skin infection can start, is that correct?

A. That's correct.

Q. Then let's take something else, too, Doctor, since we are on this subject. What is an ordinary little pimple that shows up on the skin that is pink, and raised up a little bit?

A. Well, medically as you stated before we would call it a furuncle. It is an infection

Mr. Dudnik: It is an infection.

A. It is an infection, yes.

Q. All right, it is an infection which causes a little pimple?

A. Yes.

Q. Usually nature will take care of that without it getting [fol. 189] into anything big, is that correct, take care of itself?

A. If nature is taking care of it, it wouldn't have started.

Q. Let me ask you this and I am trying to draw on my own experience; I will have a pimple or red place show up here on my arm or leg perhaps, I don't do anything about it and it goes away. How does that happen?

A. You are an exception.

Q. I am?

A. Most of the time it leads to other complications and troubles.

Q. Well, the white corpuscles in the blood attack that small infection, don't they?

A. Yes.

Q. And oftentimes kill it by themselves?

A. Yes.

Q. Without any ointment or shots or anything else, isn't that correct?

A. Well, that isn't the prevalent way.

Q. That is, if you have good blood or healthy body, that may happen?

A. In our experience, most everybody has done something, either in the form of an antiseptic or the form of a hot application or something like that.

Q. Or mercurochrome or something like that?

A. Yes.

[fol. 190] Q. But everyone of those doesn't turn into a boil, does it, and turn from bad to worse, does it?

A. No.

Q. As a matter of fact, if you scratch one of those things and pick the head off, there is a chance for more infection right there, isn't there?

A. It could spread.

Q. The bacteria from under your thumb nail, for example?

A. Yes.

Q. Then, Doctor, is this the fact in summary, that according to your records and the best of your recollection, Mr. Gallick came to you on August 26, 1954, suffering from infection of the right leg, and he did not relate to you any particular history or story as to how it had come about?

A. That's right.

Q. And you treated him for that in the same way that you would treat any ordinary skin infection, but this one didn't happen to respond to treatment?

A. That's right.

Q. At no time when you saw him did he exhibit any signs or symptoms of any poison or toxin from any insect or anything else, as far as that is concerned, is that correct?

A. Not that was apparent.

Mr. Leasure: I think that is all.

[fol. 191]

Redirect examination of Dr. Jacob R. Heller.

By Mr. Dudnik:

Q. When you say, Doctor, that no poison or toxin infection was apparent, what do you mean by that, Doctor?

A. Well, that was the purpose of my suggesting that he be hospitalized, so we could do more detailed laboratory and investigative work to determine as to why this process wasn't responding to the normal treatment.

Q. Did you advise him to go into a hospital because it was getting worse?

A. Yes, definitely.

Q. Doctor, did you advise him to go into a hospital because this condition did not respond like a usual localized streptococcae or staphylococcae skin infection?

A. I did.

Mr. Dudnik: Thank you, Doctor.

Recross examination of Dr. Jacob R. Heller.

By Mr. Leasure:

Q. While we are on that, Doctor, this staphylococcic bacteria doesn't always respond to treatment, does it?

A. Of late it hasn't more so.

Q. So the fact that it doesn't respond to treatment doesn't mean that it is something other than an ordinary staphylococcic infection?

A. Not necessarily.

[fol. 192] Q. One other thing, Doctor. I think you mentioned in the beginning of your testimony, that you brought with you all of the records that you could find?

A. That's right.

Q. Undoubtedly you either do have or have had other medical records of Mr. Gallick, is that correct?

A. Well, let me put it this way, in respect to all my patients about every ten years I go through the files, and those cases or those cards that indicate conditions of minor nature we just discard them and we feel that they would

have no particular significance, as far as the course of the person's or the patient's duty or health problems. So we discard that.

Q. Well, do you know whether that was done in the case of Mr. Gallick, or are you speculating now as to that is what might have been done?

A. No, definitely it was done. He with other patients. I would say fifteen or twenty years I have known the family.

Q. Are you telling us then that you don't have any records of any patients back past 1950?

Mr. Dudnik: Just a moment.

A. Yes, if they are of a serious nature, yes.

Q. In other words, you go through each of these cards every ten years and decide what you are going to keep and what you are going to throw away?

[fol. 193] A. That's right.

Q. One other question on this staphylococcae bacteria. Did I understand you to say that in your judgment that was the type of infection he had when he saw you, from the appearance of it?

A. From the appearances at first I would say it was of that type.

Q. And that is the kind that we literally find every place around us at all times?

A. Yes.

Q. So that whenever we have even a microscopic break in the skin, there is a good chance that some of that may get in?

A. That would be the most commonest, the staph or the strep. Of course, it could be other types.

Q. In other words, whenever we have a nick on our skin or a weak place develop because of natural causes or anything else that would give the slightest opening, we would expect either staphylococcus or streptococcus to get in, some of it anyway?

A. Yes. That would be our primary expectation.

Q. No matter where you are or how clean you try to keep yourself, and so on?

A. That's right.

Mr. Leasure: That is all.

The Court: Anything further of this witness?

[fol. 194] Mr. Dudnik: I don't think so. Thank you, Doctor.

Do you mind leaving your records here, Doctor?

The Witness: That is perfectly all right.

The Court: Ladies and gentlemen of the jury, because of a problem of records here, we will recess a little earlier this morning, to give counsel an opportunity to examine these records.

You will return to the jury room, once more with a caution that you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

[fol. 195] Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness HELEN EBERWEIN, who, being first duly sworn, was examined and testified as follows:

Direct examination of Helen Eberwein.

By Mr. Dudnik:

Q. Will you give us your name, please?

A. My name is Helen Eberwein.

Q. Where do you live, Miss Eberwein?

A. In Cleveland, Highland View Hospital grounds.

Q. Is that your residence?

A. That's right.

Q. What is your position?

A. I am medical record librarian.

Q. Did you pursuant to a subpoena bring all of the records that are at Highland View Hospital pertaining to James Gallick?

A. I did.

Q. Is he still a patient there?

A. He is.

Q. Miss Eberwein, I am handing you a sheet from the Highland View Hospital records which is identified as No. 3, and ask you if you can tell us—by the way, are you in charge of all the records at the hospital?

A. The records are only in my custody after discharge. [fol. 196] But they are all available to me.

Q. I see. You are the librarian?

A. That's right.

Q. And how long have you been the librarian?

A. Five and a half years.

Q. At the hospital?

A. At the hospital.

Q. Now, going to Sheet No. 3 of the Highland View Hospital records, can you tell us what that is?

A. This is a physical examination done on Mr. Gallick at the time of admission.

Q. At the bottom part of that sheet there is a heading diagnosis?

A. That's right.

Q. Can you tell us what that is?

A. This is the diagnosis that is made following the physical examination at the time of admission.

Q. Do you know how soon after admission to the hospital that diagnosis has to be made?

A. They are given 24 hours. The residents are given 24 hours.

Q. That is not a final diagnosis?

A. It is not.

Q. Do you know the meaning of the word provisional diagnosis?

A. Provisional diagnosis is the same thing as an admitting diagnosis. It is not conclusive.

[fol. 197] Q. Not conclusive?

A. Not conclusive.

Mr. Dudnik: Your Honor, I wish to state that Mr. Leasure and I have agreed to have Miss Eberwein photostat certain of the records which we both want to use, because Miss Eberwein says they cannot be left with the Court in view of the fact that Mr. Gallick is still a patient at the hospital.

Is that agreeable with your Honor?

The Court: Without objection it may be done.

Mr. Dudnik: You may photostat two sets, one for me and one for Mr. Leasure, and we will pick them up.

Any questions?

Mr. Leasure: No, I have no questions.

The Court: Call your next witness.

Mr. Dudnik: Mr. Neff.

[fol. 198] Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness CYRIL W. NEFF, who, being first duly sworn, was examined and testified as follows:

Direct examination of Cyril W. Neff.

By Mr. Dudnik:

Q. Mr. Neff, I am going to ask you to speak loudly enough so that all of us can hear you. We often get competition from Lakeside Avenue.

Will you state your name in full?

A. Cyril W. Neff.

Q. And your address, sir?

A. My office address is 417 Engineers Building, downtown, and 6886 Pearl Road, Middleburgh Heights in the suburb.

Q. Where do you live, sir?

A. I live at 4006 Albertly Avenue in Parma.

Q. I take it then that you have two offices?

A. That's correct, sir.

Q. What is your business or profession?

A. I am a civil engineer and a surveyor.

Q. Where did you study your civil engineering?

A. At the University of Notre Dame, Notre Dame, Indiana.

Q. When did you get your degree?

A. In the year 1923.

[fol. 199] Q. Then following that what have you done, Mr. Neff?

A. Following my degree I practiced my profession of civil engineering until the present time.

Q. And are you still actively engaged in the practice of civil engineering?

A. Yes, sir.

Q. Broadly and briefly, what does the profession of civil engineering entail?

A. The profession of civil engineering entails the design and practice of the installation of sewers, water lines, paving, structures, buildings. In fact, anything pertaining to construction.

Q. Are you a member of any engineering society, sir?

A. Yes, I am a member of the American Society of Civil Engineers since the year 1943.

Q. Are you a registered professional engineer?

A. Yes, sir.

Q. Did you at my request, Mr. Neff, make a survey of a certain area underneath and around the Columbus Road bridge in the flats of Cleveland?

A. Yes, sir, I did.

Q. And did you do that for the purpose of coming to Court and giving certain testimony?

A. That's correct, sir.

Q. Did you personally make this survey?

[fol. 206] A. I did, sir.

Q. And did you have help doing it?

A. I had help. I had one of my surveying crews as assistants.

Q. Did you following that make a sketch, rather, a blueprint of the area which you surveyed?

A. I did, sir.

Q. And beside surveying it did you make certain studies of that area for the purpose of giving us certain information?

A. Yes, sir.

Mr. Dudnik: Will you mark this?

(Plaintiff's Exhibit 12 was marked for identification by the reporter.)

Q. I hand you what has been marked for identification as Plaintiff's Exhibit 12 and ask you what this is, sir?

A. That is a plat of the survey of the area in the vicinity of the Columbus Road bridge.

Q. Mr. Neff, I am going to put it on the blackboard here. I wonder if you would be kind enough to step down here, Mr. Neff, and pointing to the map tell us exactly what you did, and what your survey showed?

The Court: Gentlemen, I wonder, I won't be able to see it anyway, if you get it in this area right here, it will be a little closer to the jury.

Mr. Dudnik: If it is all right with the Court.

[fol. 201] The Court: Is that all right where you are there?

Mr. Leasure: Yes, it is all right if it is all right with the Court.

A. Ready?

Q. Yes.

A. We located the existence of this railroad track marked B & O Railroad, and it is so shown by these two lines, indicating the two rails of the spur track.

We located the ditch which drains the area from this track, and from the surrounding areas, and we so indicated by the e two dashed lines running in this fashion to this point.

At this point we located an overpass which carries Columbus Road over this railroad track, and we have indicated the abutments of this bridge.

Underneath this bridge we found an area here which is indicated by these dashed lines and dotted lines of an area that was under water.

We located this ditch which is so indicated here by these two dashed lines to a point here where a tile starts, a 10 inch sewer pipe tile, and it goes underground in this direction.

This tile goes over to this point which is a rectangular [fol. 202] concrete manhole, a junction manhole.

We discovered here by taking off the covering that this tile enters this manhole at this point. Another tile coming in this direction enters it on this side. And a third tile leaves this manhole and goes in this direction.

Q. Now, Mr. Neff, I am going to interrupt ...

A. That's right.

Q. I take it that this area here is that water you spoke about?

A. That's right.

Q. And is that under the bridge?

A. That is under the bridge.

Q. Now, how far did you go from—this would be the northerly end of the bridge, up to this point where you started your measurement?

A. We went about 110 feet.

Q. And how far did you go from the southerly edge of the bridge in a southerly direction?

A. Approximately 110 feet.

Q. Now, sir, what did you then do after you located those area points?

A. After those points were located, we took elevation, which means the levels of the existing ground at the points [fol. 203] indicated on this map.

In other words, we started with an elevation of 100 here at the top of this manhole, which is a datum plane.

Q. A plane, p-l-a-n-e?

A. P-l-a-n-e. It is a datum, it is called a datum plane which is an elevation, a known elevation, right here at the top of that manhole.

From that point by the methods of leveling with an instrument, a transit, we established the elevations of these points here which are indicated by these numbers.

Q. Now, starting from the most northerly point where you took the elevation, will you give us the data, with regard to the elevation?

A. Yes. The elevation at the top of the rail there at that point is 100.29, which means that that point is 3½ inches above this point.

Right opposite that we come to the ditch which we found to be 98.2.

Q. What does that mean with relation—

A. Which means that that elevation is 1 foot and 8/10, which is approximately 1 foot and 10 inches, in feet and inches, below this point, the top of this manhole.

We go down here 50 feet farther and we find the ditch elevation is 97.3, which is downgrade, which is a lower

elevation, which shows that this is downgrade. In other [fol. 204] words, any water that enters this ditch will flow in this direction.

We come down here to this area and we have 96.8, which is still lower.

Q. What does that mean, sir?

A. That 96.8 means that that is 3 foot and 2/10 below this datum plane. Now, this is the low point of the area, right here.

Q. Are you pointing to about the center, to the center of the ditch?

A. Yes, the northerly part of the flood area. We get down to this point which I indicated here as the swamp area, and we have an elevation here of 98.4. That is the lowest point we discovered, at this point.

And we continued down the ditch, at this point it is 98.3, which is very very little change in grade, practically flat, a tenth in about 30 feet.

Then we come down to the tile—

Mr. Leasure: Where is that?

A. Right here, sir. We come down to the tile which we call the invert, the tile which is the lowest point on the inside of the curved part of the tile, which is called the invert tile.

The invert of that tile is 96.41, which is slightly lower than this point here, which is about 11 100, which is about [fol. 205] an inch and $\frac{3}{8}$s higher than this point, which means that the water cannot go into that tile completely.

Q. When did you make this survey, Mr. Neff?

A. This was made on June 9th.

Q. Of this year?

A. Of this year, sir.

Q. Now, this invert tile you speak of, is that the pipe through which the water flows?

A. That is correct.

Q. Now, from your examination of the area, is that tile you just spoke about the outlet for water which is in the area under the bridge?

A. That's right.

Q. When you were there, did you or did you not see an accumulation of water under the bridge?

A. I saw water under the bridge.

Q. And did you see any water, any accumulation of water to the south of the bridge?

A. Yes, sir, in this ditch.

Q. Now, sir, did you examine the manhole that you spoke about?

A. Yes, sir.

Q. And did you examine the other pipes in connection therewith?

A. Yes, sir, I did.

[fol. 206] Q. Mr. Neff, did you examine the area that would be to the west of that two rail track?

A. Yes, sir.

Q. And did you examine the area all around this place?

A. Yes, I did, sir.

Q. Did you see any other wet areas when you were there?

A. No, sir.

Q. Was that the only one?

A. That is right.

Q. Mr. Neff, have you an opinion based on your professional experience, and based on your study of this condition, as to what is the cause of the accumulation of water under the bridge?

Mr. Leasure: I will object to that, your Honor. It certainly is not a complete question.

The Court: He may answer if he knows.

A. Yes, I have an opinion, sir.

Q. What is your opinion?

A. My opinion is this, that this water does not get out of this area for two reasons.

First of all, this area is lower than the pipe through which the water must necessarily leave.

And, secondly, it is my opinion that this pipe is plugged up from its entrance here, which I showed this invert, over [fol. 207] to the manhole.

Q. Have you an opinion—

Mr. Leasure: Just a minute. I ask that the latter part go out about the pipe being plugged up. I think that is speculation. They have shown no fact here to support that.

The Court: The jury will disregard the latter part of the witness' statement.

Mr. Dudnik: About the pipe being plugged up?

The Court: Plugged up, yes. He says it is his opinion that the pipe is plugged up.

Do you know of your own knowledge that it is?

The Witness: I know that the pipe is plugged up, sir.

Mr. Dudnik: He said, your Honor, his opinion for the accumulation is the plugging of the pipe and the lower area. May the answer stand, your Honor?

The Court: I don't think he said that. He has now corrected that statement, however.

Mr. Dudnik: May the answer stand, your Honor?

The Court: The latter answer may stand.

[fol. 208] Q. So I may be sure, then, you do know from your knowledge and observation that this pipe is plugged up?

A. That's right.

Q. Have you an opinion as to what causes the accumulation of water in the ditch starting south of the Columbus Avenue bridge as it extends in a southerly direction?

A. Yes, I have an opinion of that.

Q. What is your opinion?

A. My opinion is the fact that the pipe is plugged up does not allow the water to get out of that ditch.

Q. Based on your professional experience and your examination of studies in that area, have you an opinion—

A. Yes, I have an opinion.

Q. —have you an opinion as to what would have to be done to eliminate this water area under the bridge?

A. Yes, I have an opinion for that, sir.

Q. Will you give us your opinion, sir?

A. It is my opinion that this area which I show here as a swamp area should first of all be filled with slag or other suitable hard material, bringing the elevation of this up to a point where the water will flow from this area into the invert of this pipe.

Secondly, it is my opinion that this pipe should be cleaned out from its invert to its exit into the manhole which is indicated thusly.

[fol. 209] Q. Can you tell us, Mr. Neff, from your experience and your observation, is the project you suggest a large one or a small one?

Mr. Leasure: I object to that, your Honor.

The Court: I think the question ought to be rephrased.

Q. Can you tell us, Mr. Neff, whether that condition could be easily eliminated or not, sir?

Mr. Leasure: Objection, again.

The Court: Objection sustained.

Q. Can you tell us the approximate man hours it would take to do the work which you just suggested?

The Court: You may answer.

A. It is my opinion that with a force of five men, that this area could be filled to its proper elevation and the pipe cleaned out, in one day.

Q. And can you tell us whether or not with that work done it would be a permanent improvement?

A. It is my opinion that if that would be the solution, it would be a permanent improvement.

Q. Mr. Neff, I hand you what has been marked for identification Plaintiff's Exhibit 2, and ask you to look at it.

The Court: Will you turn that around so the jury can see it?

[fol. 210] Mr. Dudnik: I will in a moment, your Honor. I just want him to see it now.

The Court: All right.

Q. Now, I will turn so the jury may see it, and I will ask you to tell us what this is? Is this area under the bridge?

A. Yes, it is.

Q. Is this the water area you are talking about?

A. Yes, sir.

Q. Did you observe this in that area?

A: Yes, I did, sir.

Q. What is that, Mr. Neff?

A. Those are pilings which I indicated on my map as cribbing.

Q. Is that four-sided, sir?

A. That is four-sided, rectangular.

Q. What happens to water that gets into that area?

A. It is retained within the area of the piling.

Q. Do you know from your experience of any use for this piling under that bridge?

Mr. Leasure: I think I will object to that, your Honor. He can't possibly know the inner and under construction of that bridge.

Mr. Dudnik: He might know. I asked him if he knows; either he does or doesn't.

The Court: I think the question should be rephrased so a yes or no may come first.

[fol. 211] Mr. Dudnik: Read the question.

(Last question read by the reporter.)

Mr. Dudnik: Answer that yes or no.

The Court: May I see the piling that you are referring to?

Mr. Leasure: I am still objecting. He can't possibly know about that particular bridge.

The Court: Will you now read the question?

(Last question read again by the reporter.)

Mr. Dudnik: Answer that yes or no.

The Court: The objection will be sustained.

Q. From an architectural standpoint, is there any use for that piling under that bridge?

Mr. Leasure: I am objecting for the same reason. He has shown no particular knowledge of that particular bridge and its under-construction.

Mr. Dudnik: He would know. Mr. Leasure says he doesn't know. We don't know if he knows until he tells us, your Honor.

The Court: Well, I think it will call for a yes or no answer.

Mr. Dudnik: All right. May he answer that question [fol. 212] yes or no?

The Court: Yes or no, he may answer it yes or no.

Mr. Dudnik: Read the question and answer it yes or no when it is read, Mr. Neff.

(Last question was read by the reporter.)

Mr. Dudnik: In other words, you answer that yes or no.

A. Yes.

Q. Will you tell us if it has any use?

Mr. Leasure: Objection.

A. It has no use.

The Court: Objection overruled.
You may answer.

Q. It has no use you say, Mr. Neff, you say it has no use?

A. In my opinion it has no use.

Q. Can you tell us how many men and how many man hours it would take to eliminate this?

Mr. Leasure: I am still objecting to this line of questioning.

The Court: Overruled. He may answer.

A. It is my opinion that those piles could be removed in one day's time by two men with proper saws and equipment.

Mr. Dudnik: You may resume the stand. You may inquire.

[fol. 213] Cross examination of Cyril W. Neff.

By Mr. Leasure:

Mr. Leasure: I will stand over here. I don't want to move that and yet I don't want to be blocked from the jury here either.

Offer in Evidence

Mr. Dudnik: Before that, may I offer this in evidence? I offer this in evidence at this time, your Honor.

The Court: What are you offering, the blueprint?

Mr. Dudnik: The blueprint, yes.

Mr. Leasure: Show an objection.

The Court: The blueprint, that is Plaintiff's Exhibit 12, will be accepted into evidence.

By Mr. Leasure:

Q. Mr. Neff, I understand you have offices in the same building as Mr. Dudnik, the Engineers' Building?

A. That's right, sir.

Q. Have you done work of this kind for Mr. Dudnik before?

A. No, sir.

Q. This is your first job for him?

A. This is the first time.

[fol. 214] Q. Now, at what time were you down there, I am not sure that we have that fixed exactly, what date?

A. I was down there first of all, to look at it on June 8.

Q. Of 1959?

A. Of 1959, and again on June 9, at which time we did the job.

Q. So whatever knowledge you have relates to June of 1959, is that correct?

A. Sir? Beg pardon?

Q. Whatever knowledge you have is as of June, 1959?

A. That's right, sir.

Q. You don't know what the situation was in August of 1954, do you?

A. No.

Q. Now, along that line you testified that in your opinion this drain pipe from the end of the ditch here to this manhole was plugged up. You don't mean to leave the impression that it is completely plugged up, do you?

A. Yes, sir.

Q. You mean no water at all is getting through?

A. No water at all is getting through.

Mr. Dudnik: Will you keep your voice up, Mr. Neff.

Q. You mean if water was high enough to enter the entire pipe, still none would get through?

[fol. 215] A. That's right.

Q. Did you make any test of that kind to find out?

A. I observed it, sir.

Q. Did you make any running water test to find out?

A. No, sir.

Q. Of course, you have no idea what that situation might have been back in August of 1954, do you?

A. No.

Q. As far as you know, the pipe could have been completely open at that time?

A. It could have been, as far as I know.

Mr. Leasure: Then with that, your Honor, I would like to move that any testimony of this witness as to the present condition of that pipe go out, and the jury be instructed to disregard it.

Mr. Dudnik: If your Honor please, there is testimony that in 1954—

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

The Court: At this time, ladies and gentlemen, you will disregard the testimony relating to the pipe being plugged up at the time that the witness made the survey.

By Mr. Leasure:

[fol. 216] Q. Now, with that out, let's go to the elevations here and see where we are.

Would a copy of this help you if you have it in front of you?

A. I would appreciate it, yes.

Q. Let's see if I can get another one here. Now, what is the total drop in inches or feet, however you want to express it, between the level at the north end of this water, which I will point out here, and the end of this pipe as it enters the manhole?

A. That is a difference of .79, which would be 9½ inches.

Q. 9½ inches is the total drop then between the far end of this pool of water and the point where the pipe enters the manhole, is that correct?

A. That's right.

Q. And that is a distance of about how far?

A. About 150 feet.

Q. Now, about how much drop is there from this same point here at the end, the north end of the water, and the near end of this 10-inch pipe which I am pointing to now.

A. Where was your point, please?

Q. The reference point here is the north end of the water, and the north end of the pipe which would be the near end of the pipe.

A. Yes, yes. That is .39, which is $4^{5}/_{8}$ inches.

[fol. 217] Q. So that pipe then has a drop of about 5 inches, is that right?

A. $4^{5}/_{8}$ inches from those two points, is that your question, sir?

Q. Well, I take it that the pipe would have a drop of the difference between $91^{1}/_{2}$ and $4^{5}/_{8}$, am I right?

A. You mean the pipe—

Q. The 10-inch tile.

A. What is your question again, what is your question, sir?

Mr. Dudnik: I can't hear you, sir.

Q. We can get a direct reading from here. The north end of the pipe, am I correct, is 96.41?

A. That's right.

Q. And the south end of that 10-inch tile pipe is 96.01?

A. That is right.

Q. So it would be .4 of a foot?

A. .4 of a foot.

Q. Which is about 5 inches?

A. Which is $4^{3}/_{4}$ inches.

Q. So from here to here there is a fall of $4^{3}/_{4}$ inches?

A. That's right.

Q. In what distance?

A. In about 40 feet.

Q. Now, the pipe leading out of this manhole, which would be down drain, is how far below this 10-inch tile [fol. 218] where it enters the manhole?

A. That is .28, which is $3^{3}/_{8}$.

Q. 3⅜ inches?

A. Yes.

Q. Well, is it a fact, then, that the manhole end of this 10-inch tile here, the one leading from the ditch, the manhole end of that tile, cannot be dropped if this down drain is to continue to operate effectively?

A. Beg pardon, I didn't hear you.

Q. I am asking you whether it would be feasible to drop the end, the manhole end of this 10-inch pipe, which runs from the ditch here to the manhole?

A. No, it wouldn't be good engineering practice to drop that any more.

Q. And the reason for that is, is it not, that if you did drop it you wouldn't get any down drainage from the out tile here where it goes out of the manhole?

A. Not as good.

Q. Not as good. Of course, if you got it very much lower you would have back-up instead of outgo, from this 10-inch pipe here, isn't that the idea? In other words, you have only got 3⅜ inches to work in there, is that correct?

A. 3⅜ inches between the invert of the pipe going into the manhole, and the pipe leaving the manhole.

Q. In other words, if I get a piece of chalk here—let's [fol. 219] draw a manhole here so we know what we are talking about, and that is just a box-like affair, is it not?

A. That's right.

Q. With a cover on top?

A. Yes.

Q. Now, following the same directions you have up there, you have got this one pipe coming in from here, and that is this 10-inch pipe that leads down from the ditch?

A. Yes, sir.

Q. All right. You have got another one I see coming in from this other direction, and is that at about the same level?

A. No.

Q. Is it a little bit higher?

A. That is a little higher—that is lower than the one coming in.

Q. Oh, is that a 5 here?

A. It is lower than. The elevation of that one that you have just drawn is 96.01, and the other one coming in is 95.94, which would be about $\frac{7}{8}$ of an inch lower.

Q. All right, and then the pipe that leads out of that manhole—we have got drainage this way into the manhole, and this way—

A. Yes.

Q. And then we have a pipe leading out of the manhole to [fol. 220] get the water out of there, right?

A. Yes.

Q. And that one is the one coming down here?

A. Yes, that's right.

Q. Let's draw that in, and that one is $3\frac{3}{8}$ inches lower, right?

A. That's right.

Q. In other words, it is coming out toward me and not down, but that is the only way I can draw it.

A. That's right.

Q. So then the system there is, is it not, that water from this pipe goes in, water from this pipe over here goes in, and then the water gets out of there by going down this pipe towards the bottom of the blackboard there, right?

A. That's right.

Q. And the level of this is only about $3\frac{3}{8}$ inches higher than the level of this, is that correct?

A. Yes.

Q. So if you lower this, you say it wouldn't be good engineering practice to lower this, because if you lower it more than $3\frac{3}{8}$ inches you would get backed up here?

A. A little bit.

Q. As a matter of fact, you wouldn't want it just the same, would you?

A. No.

[fol. 221] Q. You would want it higher?

A. Yes.

Q. That is the best way to have it, right, and that is the way it is here. Is that correct?

A. Yes.

Q. Now, going then back up this pipe, we have got a drop there of about 4 inches in 40 feet, 4 and a fraction, whatever it was; that isn't very much drop, is it?

A. Well, it is adequate.

Q. You think that is adequate, all right. What would be the minimum would you say in 40 feet that would be adequate?

A. About 1/10 would work.

Q. You mean 1/10 of the distance?

A. 1/10 of a foot. That is an inch and a quarter drop would carry the water away.

Q. Does that allow for accumulation of sediment, and so forth?

A. No.

Q. That naturally develops in one of those things?

A. That is assuming the best of conditions.

Q. That is assuming perfect conditions?

A. That's right.

Q. But it is the natural experience, isn't it, where you have drainage like this, that silt and so forth is going to get into your drain pipes?

[fol. 222] A. That's right.

Q. That is the purpose of this manhole, isn't it, to catch that stuff and clean it out every once in a while?

A. That's right.

Q. Well, under these conditions, with silt, and so forth, since you have an open end pipe here coming out of an open ditch, what would you say would be your minimum drop to have a good drainage condition there?

A. I think the slope that you have got there at present is adequate.

Q. That is about right?

A. Yes. It is just a matter of maintenance.

Q. Now, from that end, though, from the end there up to the near end of this water there is how much drop in that open ditch?

A. There is no drop. There is an upgrade of a very slight amount, probably a hundredth of a foot, an upgrade. 96.40 is the end of the swamp area, and 96.41 is the invert. So therefore, the invert is one hundredth of a foot higher than that point in the swamp area.

Q. So that in a distance of what, about 60 feet, you don't have any drop at all?

A. No drop at all.

Q. Now, you suggest, as I understand you, to fill in this area where the water is with slag, to bring th elevation [fol. 223] of the ground up?

A. Yes.

Q. How far would you have to bring the elevation up in order to avoid having water stand there?

Mr. Dudnik: Mr. Neff, I can hardly hear you, sir.

A. I didn't say anything yet.

Mr. Dudnik: I am having a little trouble.

A. Repeat that, please?

Q. How far would you have to bring the elevation up, of this area under the bridge, in order to avoid having water stand there according to your calculations?

A. About 6 inches.

Q. Is your idea, then, that the water from north of here, which goes up to the upper left-hand part of your drawing—

A. Yes.

Q. —would go right over that without stopping there, is that the idea?

A. That's right.

Q. That is your theory, all right.

A. Yes.

Q. Now, the natural drainage direction is from the upper left-hand corner of your drawing here down toward the lower right-hand corner, is that correct?

[fol. 224] A. The slope is in that direction, sir.

Q. That is the natural slope down there in that area, is that correct?

A. It is the slope that we find.

Q. By the way, on this fill proposition, what kind of material did you say you suggested using, slag?

A. I would suggest slag.

Q. What is slag specifically, now, so we understand each other?

A. Slag is a material which is produced by the blast furnaces. It is residue that comes off the material that they use in the manufacture of steel. A very common material which is widely used in fill.

Q. Some of these figures I am not sure of here, if you will excuse me just a moment, while I add something up.

Now, this pipe that goes down drain here, shown here on your drawing, did you make any effort to find out where that went to?

A. No, sir.

Q. Or what it connected into?

A. No.

Q. Mr. Neff, do you know anything about practical railroading, have you ever done any railroad work?

A. Yes, sir.

Q. Would you tell us about that, please?

[fol. 225] A. Well, just recently we did the entire survey of the area in the Warner Road, Turney Road overpass section, for the City of Cleveland, and which is going to eliminate the bottleneck at Turney Road and Warner Road.

Q. That is sort of a bridge across the track?

A. That is an overpass over the Pennsylvania Railroad, which we took elevations of the Pennsylvania Railroad, the drainage situation there, and offered our suggestions and our opinions on what drainage there presently existed, and what they should use for the construction of this proposed cloverleaf and overpass.

Q. If I have the right place in mind, that is composed of a highway overpass over railroad tracks and other area?

A. Yes.

Q. Is that the extent of your railroad knowledge?

A. No.

Q. What else do you have?

A. We have had jobs similar to this where we installed the railroad track, staked out and supervised the installation of a railroad track in Lorain, Ohio, for the New York Central Railroad.

Q. All right. Anything else?

A. Well, those are two that come to my mind at the moment. I think if I dug into my files I could come up with some more.

Q. You don't think of anything else at the moment?

[fol. 226] A. Not at the moment, sir.

Q. What kind of material is this—is is Plaintiff's Exhibit 2—these big blocks here that are on the abutments to the Columbus Road bridge as shown on that exhibit, did you make any inspection of those?

A. Yes. That is stone.

Q. What kind of stone?

A. Limestone.

Q. Actually it is a sandstone, isn't it?

A. Not necessarily. My opinion is it is limestone.

Q. Well, do you know for sure?

A. My opinion is that it is limestone.

Q. You think so, all right. Do you know when that bridge was built?

A. My guess would be about—

Q. I don't want you to guess. Do you know?

A. No, I don't know exactly, sir.

Q. It appears to have been there a good long long time.

A. It appears to have been there a great many years.

Q. Would you be surprised if it had been there before 1900?

Mr. Dudnik: Why don't you tell him? He said he didn't know. Why don't you tell him? There is an objection to that.

Mr. Leasure: I will withdraw that.

[fol. 227] Q. Did you make any effort to find out what the condition was underneath the stone siding of this bridge?

A. No, sir.

Q. Did you make any effort to find what was underneath, did you make any effort to?

A. No.

Q. Did you look at any plans or anything like that that covered the construction of that bridge?

A. No.

Q. Now, I want to get information on one particular point here. You may still look at your blueprint. Take the reference point at the north end of the water area under the bridge, and the point at the south end of that water area, and there is a difference there of .4 of a foot, is that correct?

A. That's right.

Q. So that in this space here, from here to here, we have a drop of .4 of a foot?

A. Yes.

Q. Which would be about 6 inches?

A. No.

Q. 5 inches?
A. No.
Q. What would it be?
A. 4¾.
[fol. 228] Q. Okay, I would still say about 5 in round figures.
A. Yes.
Q. Then the drop from the south end of the bridge down to the beginning of this 10-inch underground tile is negative, isn't it?
A. That's right.
Q. Instead of positive. So we lose .1 of a foot there. .1 is let us say 1 inch?
A. No, it is one hundredth.
Q. .1 of a foot?
A. No. If you will read that, 96.41.
Q. Okay, what does it amount to in inches?
A. One hundredth is an eighth of an inch.
Q. Well, I discount that myself. Can we agree then from the north end of this water to the beginning of the 10-inch drain tile there is a drop of approximately 5 inches?
A. Are you asking me a question?
Q. Yes, I am asking you. To be precise, from here, the west end of the water area down to here, the beginning of the 10-inch drain tile, there is a net drop of approximately 5 inches or slightly less?
A. Slightly less.
Q. A fraction less. 4 and what, about ⅞?
A. About that. About 4¾.

Mr. Leasure: I think that is all.
[fol. 229] The Court: Anything further?
Mr. Dudnik: Just a couple questions, Mr. Neff.

Redirect examination of Cyril W. Neff.

By Mr. Dudnik:

Q. You were asked whether you ever did any work for me. I never met you before last week, had I, Mr. Neff?
A. That's right.

Q. Although I guess we have been in the same building for some time, you didn't know me either, did you?

A. I knew who you were, sir.

Q. We never had spoken, other than maybe say hello?

A. Say hello.

Q. I have just one question. Water can't flow upwards, can it?

A. No, sir.

Q. And this area here is lower than the entrance to the drain pipe, is that right?

A. That's right.

Mr. Dudnik: Thank you, sir. That is all. I have no more questions.

Mr. Leasure: Just a minute.

Recross examination of Cyril W. Neff.

By Mr. Leasure:

Q. That last statement is not correct, is it, sir?

[fol. 230] Mr. Leasure: Will you read the last question and answer?

(Last question and answer was read by the reporter.)

Mr. Leasure: Were you pointing to something when you say this area?

Mr. Dudnik: I mean this area here.

Mr. Leasure: I didn't see what you were pointing to.

By Mr. Leasure:

Q. That statement isn't correct, is it?

A. According to my numbers, it is correct.

Q. Well, I thought you just finished telling me that there was from the west end of this water to the beginning of the drain pipe, there was a drop of 4¾ inches?

A. Yes.

Q. You don't have any readings here for any place between one end of this pool of water and the other, do you?

A. No.

Q. But the readings from one end to the other show that there is a drop within the space of the water there of .4 of a foot, is that correct?

A. Right.

Q. So that the average there is still above the beginning of this 10-inch drain pipe, 2 to 3 inches above, is that [fol. 231] correct?

A. The average would be—you are averaging those two numbers, that is correct arithmetically.

Q. So that the only place where this water is above the level of this drain pipe here is right at the extreme end where it is about an eighth of an inch below?

A. That's right, it is lower.

Q. At that one point only, and that is about an eighth of an inch, is that correct?

A. That's right.

Mr. Leasure: That is all.

Further redirect examination of Cyril W. Neff.

By Mr. Dudnik:

Q. Mr. Neff, I pointed to the area underneath the bridge, that swamp area we are talking about. Is that lower than the pipe or higher, sir?

A. That area there is lower than the pipe.

Q. And is that why it will not flow into the pipe, sir?

A. That is one of the reasons why it won't flow into the pipe.

Q. And could that be eliminated by the filling in of slag that you told us about?

A. Yes, sir.

Mr. Dudnik: Thank you, sir.

[fol. 232] Further recross examination of Cyril W. Neff.

By Mr. Leasure:

Q. Filling in about 6 inches of slag, how do you arrive at the 6 inches, sir?

A. I am computing the proper drainage, and 6 inches would bring that up to an elevation which would give us an adequate slope down to the pipe.

Q. I notice that you made measurements on only one of the rails there along that line of track, is that correct?

A. That's right.

Q. You didn't make any measurements of the line of rail that is next to this area of water, did you?

A. No.

Q. You didn't make any measurements of this line of track right here, did you, the one I am pointing to?

A. The inside?

Q. The inside.

A. No.

Q. The one on the inside of the curve.

A. No. We used the outside rail.

Q. Actually, that track is banked there a little bit, isn't it?

A. It might be.

Q. So that the outside—

A. It might be banked. It doesn't appear to be. It wasn't [fol. 233] enough to be concerned with. All we wanted to do was use the relative elevations.

Q. I am just asking you what you did or didn't do. Now, it is customary, you know from your railroad work, it is customary to bank a curve in the track, a main track, isn't it?

A. On a main track, yes.

Q. And this track goes up to Whiskey Island, or don't you know that?

A. Yes.

Mr. Dudnik: That is not a main track, Mr. Leasure.

Mr. Leasure: Well, I beg to differ with you.

Mr. Dudnik: Fine, sir, all right.

Mr. Leasure: It is.

Q. It is not a siding in a yard, is it?

Mr. Dudnik: It is a single track.

Q. Well, did you make an effort to find out where the track goes from and to?

A. I walked up here, and there is a drawbridge, a lift bridge there at the end where it crosses the river. I walked up there, and I walked down here. I walked probably a quarter of a mile in this direction.

Q. Did Mr. Dudnik tell you that this track right here goes from Clark Avenue up to Whiskey Island, a distance [fol. 234] of about three miles, did he tell you that, this track right here?

A. Perhaps that is true.

Mr. Leasure: I think that is all.

Mr. Dudnik: That is all. Thank you, Mr. Neff. Thank you very much.

The Court: You may step down, sir.

Mr. Leasure: I do have another question of Mr. Neff, I am sorry.

By Mr. Leasure:

Q. Would you mind coming back here? I still have trouble with some of these figures and I think I can determine now what one of these is which I wasn't sure of before. Let me ask you, will you take the stand again?

(Witness resumes the witness chair.)

Q. This relates to the last question I was asking you about the height of the rails there. Let's take what you have here, which is a measurement of the height of this rail here, the outside rail. Let's take a point up here at the north end of the water, and a point opposite to that on the outside rail.

A. Yes.

Q. Now, what is the difference in elevation between those two points?

A. Between those two points?

[fol. 235] Q. Yes.

A. 1.26, which is 1 foot 3 and an eighth.

Q. One foot 3 and an eighth, and how high is the rail above the tie?

A. The rail is approximately 7 inches.

Q. And about how high is the railroad tie?

A. 8 inches.

Q. Will you give me that first measurement again? I didn't get it down.

A. 1 foot 3 and an eighth.

Q. In inches that would be 15½ inches, is that right?

A. Yes, sir.

Q. The rail and the tie would be 15 inches overall, 8 plus 7?

A. Well, that would add up to 15.

Q. So that as that track stands, the bottom of the tie is within an eighth of an inch of the elevation where this water begins?

A. Yes.

Q. Now, let's come down to the east end of this water and give us the elevation of the water and the top rail at that location?

A. Well, the water is 96.4, and the top of the rail is 97.77 which would give you 1.37. That would be 1 foot 4 and a half.

[fol. 236] Q. That would be 16½?

A. That's right.

Q. And the rail and the tie again would be 15 inches, so that would leave an inch and a half?

A. Yes.

Q. Now, can you tell us whether or not that track is banked so that the near rail, the one nearer the water, would be lower than the outside rail?

A. I can't tell you that exactly, sir.

Q. You wouldn't be surprised if it was, from your knowledge of railroading?

A. No. It would be likely.

Mr. Leasure: All right, that is all.

Mr. Dudnik: I am lost. No more questions. Thanks.

The Court: At this time we will adjourn for the noon hour, and you will first return to the jury room, once more with the admonition that you do not talk about this case to anyone, even amongst yourselves.

You will return at 1:30.

(Thereupon an adjournment was taken to 1:30 p.m. on Monday, June 15, 1959, at which time the following proceedings were had:)

[fol. 237]

Monday afternoon session, 1:30 p.m., June 15, 1959

Thereupon JAMES J. GALLICK, the plaintiff herein, further to maintain the issues on his part to be maintained, having been previously sworn, resumed the witness stand and was further examined and testified as follows:

Cross examination of James J. Gallick.

By Mr. Hadden:

Q. Jim, we have a few more questions for you. I will try to keep them just as brief as I can, because I know this isn't very pleasant for you.

I am interested in learning a little bit more about your recollection of the date of your insect bite.

On direct examination I think you said that your best recollection was that it was the 10th of August of 1954?

A. I don't remember.

Q. You don't remember the date?

A. I don't remember. I said it was around the 10th, around the 10th.

Q. Do you remember on your deposition, Jim, two years ago when we took your testimony in the Cleveland Clinic, you said substantially the same thing, but you also said as I recall that it might have been the 11th or 12th of August, but it would be no earlier than August 10th, do you remember that?

[fol. 238] A. Yes.

Q. Is that still your best recollection of the circumstances of it?

A. Yes.

(Defendant's Exhibit G-1 and G-2 were marked for identification by the reporter.)

Q. Jim, I am going to hand you one at a time these two pieces of paper, these are photostatic copies of what purports to be time earnings. I am sorry, I don't have the original, but they seem to be misplaced.

Mr. Dudnik: Could I look at them?

Mr. Hadden: Yes.

Mr. Dudnik: Show them to the Court first.

Q. I am handing you first Defendant's Exhibit G-1, and I would like to have you look at that if you would, and particularly I direct your attention to the lower right-hand corner in the space which appears to contain some signatures, and I will ask you if you recognize any of the signatures there?

A. You mean below mine?

Q. No, I am referring specifically to yours. Do you see your signature there?

A. Yes.

Q. And do you recognize it as being your signature?

[fol. 239] A. That is my signature.

Q. This is a time report which the yard foreman turns in daily at the completion of the run, is that not so?

A. Yes.

Q. And do you recognize that as being a report which you yourself turned in on August 10, 1954?

A. Yes.

Q. Now, I will hand you the other one, Defendant's Exhibit G-2; would you look in the same location, sir, and I will ask you if that is not the same sort of report prepared for the date of August 12, 1954?

A. Yes.

Q. These reports show not only the times that you worked, but the members of the crew with whom you worked, is that not so?

A. Yes.

Mr. Dudnik: May I ask, is that one for the 10th and one for the 12th?

Mr. Hadden: That's right.

Q. And they also indicate, do they not, that you worked as yard foreman on each of those two days?

A. That's right.

Q. Now, handing you Defendant's Exhibit G-1, again,

Mr. Gallick, I will ask you whether in looking at that, whether that piece of paper refreshes your recollection at [fol. 240] all as to the members of the crew who worked with you on the date August 10, 1954?

A. It does not.

Q. It does not refresh you. Are you acquainted with all the gentlemen whose names appear there?

A. Yes.

Q. So the record will show about how many it is we are talking about, that is Mr. William I. Clason, Mr. William Molnar, and Mr. Charles R. Valek?

A. Yes.

Q. Is the same thing true, sir, of the other exhibit, Defendant's Exhibit G-2, that is, you know all the people who are named there, but you are not refreshed as to whether or not they worked with you on that particular day?

A. That's right.

Q. And so we have the record straight on that, they are Mr. William I. Clason, Mr. William Molnar, and Mr. Cloyd W. Stine, is that right?

A. Yes.

Q. Jim, do you know what a Form 790 is as far as the B & O Railroad is concerned?

A. Yes.

Q. That is, is it not, a report form which is required to be made out by any employee who is injured on duty?

A. That's right.

[fol. 241] Q. What can you say, sir, as to whether or not a report Form 790 was made out in connection with your insect bite?

A. There wasn't any.

Q. There was none.

Mr. Dudnik: Beg pardon?

A. Can I say something?

Mr. Dudnik: No, Jim. Wait until you are asked. Later on if you want to say something it is all right, but I suggest that you wait until you have answered his questions.

Mr. Hadden: Mark this, please.

(Defendant's Exhibit H was marked for identification by the reporter.)

Q. Jim, I hand you what has been marked Defendant's Exhibit H; it is a printed form with some typewriting on it, in the upper right-hand corner it has in small type the words form 790. That, so far as the printed form is concerned, is the kind of report we have just been talking about, is that not so?

A. Yes.

Q. Now, I will ask you to look at that briefly. Looking at the lower right-hand corner which your typed name appears, and also after the words "Person injured," and your name also appears there, that appears, does it not, sir, to be a report prepared with reference to your insect bite, does it not?

[fol. 242] A. Yes.

Q. Do you have any knowledge, sir, as to how that report came in existence?

A. No, I don't.

Q. Did anyone from the railroad ever contact you with regard to the circumstances of your insect bite on the date or prior to the date of this report, which is October 20, 1954, at which time you already were in the hospital?

A. Yes. At that time, Spinelli and Robinson.

Q. Mr. Spinelli and Mr. Robinson had already been in touch with you, had they?

A. Yes.

Q. Is that by way of a visit to the hospital?

A. Visit to the hospital.

Q. You yourself never filled out one of these report forms in your own handwriting, is that right?

A. No.

Q. Excuse me, go ahead.

A. Because Spinelli told me it wasn't required to make out a 790 on an insect bite.

Q. I see. At least so far as you are aware you had nothing to do with the preparation of this report?

A. No, I did not.

Q. And you never saw anybody else prepare it, a report covering this matter?

[fol. 243] A. No.

Q. Neither Mr. Spinelli or Mr. Robinson?

A. No.

Q. While we are talking about Mr. Spinelli, Mr. Gallick, you knew him prior to any events that had anything to do with your insect bite, didn't you?

A. Yes, sir.

Q. Did you know him fairly well?

A. Yes.

Q. What was your opinion of Mr. Spinelli?

Mr. Dudnik: Objection as to what his opinion was of the claim agent.

Q. Was it your experience that Mr. Spinelli always dealt with you fairly?

Mr. Dudnik: Objection. What he did in the past has nothing to do with this situation, your Honor, if he did, I don't know. There is an objection.

Mr. Hadden: I will lay the foundation for it, your Honor.

Mark this.

(Defendant's Exhibit I-1 and I-2 were marked for identification by the reporter.)

Q. Jim, I am going to hand you another piece of paper which has been marked Defendant's Exhibit I-1 on one side, [fol. 244] and I-2 on the other side by the reporter.

It also has been marked in the lower right-hand corner Defendant's Exhibit A which was marked that way at your deposition at the Cleveland Clinic two years ago.

I will hand you that, Jim, and ask you to look at it, please, and I want you to look particularly at the bottom of each page where there appears to be a signature which is your signature?

A. It is my signature.

Q. And do you recognize that piece of paper, sir?

A. I can't see—

Q. You do, however, recognize your signature?

A. Yes.

Q. You are looking at one side of it, being the front of it; I will turn it over for you and show you the other side, and I will show you the bottom line in the lower right hand corner, is that also your signature there?

A. Yes.

Q. Now, I think you testified on direct examination that Mr. Spinelli and Mr. Robinson came to see you while you were in the hospital?

A. Yes.

Q. At Marymount?

A. At Marymount.

Q. And that a statement was taken?

[fol. 245] A. Yes.

Q. Are you able to say, sir, by looking at that whether or not this is the piece of paper?

A. No.

Q. You are not able to say?

A. No.

Q. Do you recall, sir, my having shown this to you and I believe having permitted you to read it over when we took your deposition at the Clinic two years ago?

A. No, I don't.

Q. Well, so that we can have the record show what your recollection as to this is, I wonder if you will read it over to yourself at the present time, and satisfy yourself as to whether or not that is the statement which was signed by you in the presence of Mr. Spinelli and Mr. Robinson at Marymount Hospital.

You don't have to read it all the way through, if you become satisfied that it is that statement.

A. Well, right here I don't remember—

Mr. Dudnik: No, Jim. I think he wants to know whether this is the paper you signed for the claim agents if you recall that it is.

A. Yes, it is.

Mr. Dudnik: That is all he wants to know.

[fol. 246] Q. That is all I want to know. Thank you.

Do you recall telling me in the course of your deposition, Jim, that the contents of this statement which you signed in Marymount Hospital was true and correct in accordance with your best recollection at the time we took your deposition in August of 1957?

A. No, I don't.

Q. You don't recall saying that?

A. No.

Q. I will read you one or two questions and answers, sir, from that deposition, and see if this will refresh you, from Page 89.

Mr. Dudnik: Just a minute, please. Page 89? All right.

Mr. Hadden: Near the bottom.

Q. This question was asked: "Well, this statement, Defendant's Exhibit A, is the statement that you made, is that right?

"A. Yes.

"Q. This is your signature?

"A. That is my signature.

"Q. On the bottom part of it?

"A. Yes."

I am going over to the bottom of Page 90.

[fol. 247] "Q. You do remember signing it?

"A. Yes.

"Q. And as far as you recall it was correct and represented your best memory at the time?

"A. Yes, at the time."

Do you remember those questions and answers, Jim?

A. No, I don't.

The Court: What was that answer?

Mr. Hadden: No, he does not.

Q. You don't deny that you did make those answers to those questions, do you?

A. I don't remember that I did.

Q. Well, if the record shows that that is what you said, you have no reason to dispute it, have you?

A. Yes.

Q. You mean that is correct, is that right?

A. Yes.

Q. So far as the crew with whom you worked on the date of this occurrence is concerned, Mr. Gallick, I think you said on direct examination that after you had been bitten you mentioned the fact to someone who was on the footboard, is that right?

A. On the front footboard.

Q. On the front footboard of a locomotive; was the man to whom you made that remark a member of your crew on that day?

[fol. 248] A. He was.

Q. Then so that we have it entirely clear, when you testified on direct examination that you didn't know who that was, you didn't mean to say that you weren't acquainted with that man, it was merely that you do not remember who it was, is that right?

A. I don't remember who it was.

Q. But you were acquainted with all the men who worked with you?

A. Yes.

Q. Jim, when was it that you first tried to recall and fix in your own mind the date of the insect bite?

A. Around the 10th.

Q. I guess I haven't made the question entirely clear to you. I think you testified on direct examination that there were a number of days that went by after you were bitten, during which you didn't give it any particular thought, because it didn't seem serious to you.

I am trying to find out how many days did go by before you did first begin to be concerned about it, and you first tried to fix the day.

A. Well, I wouldn't know for sure.

Q. I appreciate that. But can you give us some approximation of how long that was? Was it a matter of a week or perhaps two weeks?

[fol. 249] A. No, it was I would say close to a week.

Q. About a week, and was it about that time also that you first tried to remember when it took place?

A. No, I tried to remember after I seen Robinson and Spinelli.

Q. At the hospital?
A. At the hospital.
Q. Did they visit you once or more than once?
A. I think it was more than once.
Q. Do you recall the time book that was shown to you by Mr. Dudnik last week, do you not?
A. Yes.

Mr. Hadden: Has this been marked?
Mr. Dudnik: Yes.
Mr. Hadden: Plaintiff's Exhibit 11.

Q. I think you testified on direct examination as to when it was that the word bug was put in here opposite the date of August 10th?
A. Yes.
Q. Just so that I have it clearly in mind, was that at about the time that Mr. Robinson and Mr. Spinelli came to see you that you put that word in there?
A. Yes, I believe it was.
Q. And that was the first occasion when you had any reason to attempt to fix in your own mind what day it was that [fol. 250] the insect bit you?
A. Yes.
Q. Was that the same day on which the written statement was taken, do you recall?
A. No, I don't recall.
Q. You don't remember. But at any rate, it was after you were in the hospital, and it was thus something like over a month since the time of the accident?
A. Yes.
Q. Or the injury or insect bite or whatever it can be called. Jim, when we finished up last Friday we were talking about—excuse me, do you want to take a break?
A. No, no.
Q. When we suspended last Thursday we were talking generally about the conditions around the right-of-way under the Columbus Road bridge, and in that vicinity, and we had talked at some length about the dead and dying pigeons which you described as having been there.

Now, with reference to that same general area and the area where you were bit, what can you tell me as to the

quantity of dead rats which you might have seen at any one given time under the Columbus Road bridge?

A. Well, I wouldn't know because I never counted, I never counted them.

Q. No, of course not. Is it a fact that there were some [fol. 251] dead rats there at all times?

A. Yes.

Q. Would it be something more than one at all times?

A. At all times.

Q. Again, without attempting to pin you down in any way, can you give us an expression of approximately the number that were involved?

A. (No answer.)

Q. Would it have been as many as 10?

A. Well, I don't know, but that would be closer to it.

Q. It would be closer to 10 than to 1, is that it?

A. There was dead rats and the hides of dead rats laying in there, dead pigeons, and the hide, the shell, of the dead pigeons.

Q. If you will just do this for us now, restrict yourself to the rats. We talked about the pigeons before.

If I understand you correctly, you are saying that 10 dead rats would not be too far out of line?

A. Could be 10, could be more.

Q. Is that, sir, your best estimate as to the number of dead rats immediately underneath the bridge?

A. Yes.

Q. And it would be safe to say, then, that there were others that could be found in both directions from the bridge, is that right?

[fol. 252] A. Yes, that's right.

Q. And would the area in which those could be found be pretty much the same as the area that you described last Thursday where the pigeons were found?

A. Yes, you know, laying on, laying around.

Q. And they would extend down as far south as the overhead bridge of the Sherwin-Williams plant?

A. Not quite as far as that. I would say to the Sherwin-Williams plant.

Q. Was it the same general area as the pigeons were found, or were the rats somewhat more restricted in the places that they might be found?

A. They were more restricted there.

Q. In other words, there were more pigeons than there were rats?

A. No, not more. The most, the worst was underneath the Columbus Road bridge, that's what.

Q. But they were found also down to the south?

A. Yes.

Q. Substantially towards where the Sherwin-Williams plant is?

A. Yes.

Q. Now, let's direct our attention for a moment to the insects which you recall having seen there, and I am referring for the purposes of this question to the insects which [fol. 253] you observed prior to the day on which you were bitten.

Mr. Dudnik: Where, Mr. Hadden? Where?

Mr. Hadden: I will get to it.

Q. First, with reference to the same area right underneath the Columbus Road bridge, under which you say you were bit, are you able at this time to recall and describe for us any of the different kinds of insects or bugs which you saw?

A. How could I describe them?

Q. Well, I just want to find out, if you can't describe them—

A. No. They crawled, they flew.

Q. Well, you are familiar of course, as we are all, with the various usual types of insects in this vicinity, mosquitoes?

A. I know mosquitoes, flies.

Q. Mosquitoes, flies. Were there any other kinds, names of insects that you can give us?

A. Yes. Many. Oh, no, not the names that I could give you. But there was other.

Q. Other types?

A. Other types.

Q. What can you say—I am trying to get some idea of what types these were—can you describe any one of them with any greater degree of precision?

[fol. 254] A. I know nothing about insects.

Q. Well, we are all going to learn a little bit about them in the course of this I guess. How about the sizes of any of the other insects, can you remember how big any of the other ones were that you saw?

A. No. They varied in sizes, too.

Q. They would both crawling varieties?

A. Yes.

Q. And varieties with wings?

A. Yes, flying, yes.

Q. Do you know anything about the colors of them?

A. No.

Q. Do you recall having seen Canadian Soldiers in the vicinity of the bridge from time to time?

A. Yes.

Q. Any gnats?

A. Well, I just don't know what a gnat is.

Q. It is a fact, isn't it, that you never saw anything under the bridge, under the Columbus Road bridge, before the insect bite that looked anything like the one that you felt when you snapped at your pant leg, isn't that so?

A. I don't know because I don't know what it was that I felt.

Q. Do you recall, you were able to describe the size of it, weren't you, on your direct examination?

[fol. 255] A. Yes.

Q. It was about 2 inches long and about half an inch in diameter?

A. Yes.

Q. Do you recall ever having seen under the bridge anything that looked as you have described the insect felt?

A. Well, I have seen that size crawling on these dead hides.

Q. You have?

A. I have.

Q. I want to read you one question and one answer that you gave in your deposition again, Jim. Page 76.

Mr. Dudnik: Line?

Mr. Hadden: I don't have the numbers on mine. About a quarter of the way down the page.

Q. At your deposition in a Clinic two years ago I asked you this question and you made an answer that I will read to you.

"Q. Did you ever see anything that looked like what this thing in your pant leg felt like?

"A. No."

Do you recall that question?

Mr. Dudnik: Just a moment, please. Read the whole [fol. 256] answer. Show the dashes where you interrupt him with another question, please.

Mr. Hadden: All right.

Q. You said, the question again:

"Did you ever see anything that looked like what this thing in your pant leg felt like?

"A. No. I couldn't. And then I—"

Mr. Dudnik: Dash, Dash.

Mr. Hadden: Well, he didn't say dash dash.

Mr. Dudnik: You know what that means, don't you?

Mr. Hadden: Let's read the question that is printed on the page.

Mr. Dudnik: What does dash dash mean to you?

Mr. Hadden: I interrupted him with a question apparently.

Mr. Dudnik: That is all I asked you.

Q. "Well, would it be fair to say that the insects which you did see on prior occasions and perhaps on this day as well were flies, spiders, and the ordinary?"

And then you interrupted me with an answer, "Yes, different various kinds, different kinds."

[fol. 257] Do you recall those questions and answers, Jim?

A. Yes.

Q. Well, are we to understand that you can now recall having seen insects of the size that you felt in your pant leg?

A. No, I don't know nothing about that. I have seen various sizes, and about the size that I felt in my pants leg.

Q. You now do remember having seen insects on the ground—

A. Yes, I seen.

Q. Before the date of your bite?

A. Yes.

Q. Of the size which you felt.

The Court: Are you having any trouble hearing?

Mr. Dudnik: You are, Jim. I will have to move you a little closer. Jim, would this be better for you? How is that?

Q. Do you mind if I stand here where I can't really see you?

A. No, that's all right.

Q. You can hear me all right. I will read you one more question, Jim.

Following those which I have already read there is a question, "In any case, you never did see anything that looked like the way the one that bit you felt;"

[fol. 258] And you answered "No."

And there were no dashes or anything after that answer. You do remember making those answers, do you, Jim, two years ago?

A. Yes.

Q. All right. Just a few more questions. You testified, Jim, that you made some complaints to Paul Delaria, the track foreman, before this occasion?

A. That's right.

Q. Now, this may be difficult for you, but I want you to try as much as you can to recall the circumstances of those conversations that you had with Mr. Delaria.

First of all, do you recall how often it was that you mentioned the conditions to Mr. Delaria?

A. At least twice I asked him why he can't clean up the dead rats and the dead pigeons.

Q. Your remark to him was with specific reference, was it, to dead rats and dead pigeons?

A. That's right.

Q. Do you remember where it was you had these discussions with him?

A. No, I don't remember where it was, but it was on the right-of-way.

Q. It was while both of you were at work?

A. We were working, yes, sir.

[fol. 259] Q. Was it in the neighborhood of the Columbus Road bridge?

A. I think—

Mr. Dudnik: You mean where you had the conversation?

Mr. Hadden: Yes.

A. Yes, it was around there someplace.

Q. Well, you are somewhat vague in your mind as to where exactly it was, are you not?

A. At one time I know it was at West Street.

Q. At West Street?

A. At West Street.

Q. And by West Street you refer to the team track?

A. Team track.

Q. Located at West Street?

A. Yes.

Q. And that was the place where you had one of these conversations with Mr. Delaria?

A. Yes.

Q. What did you say by way of indicating to him what area you were referring to?

A. Well, he knew what area I was referring to.

Q. Well, what area were you referring to?

A. Columbus Road bridge and south of it.

Q. Do you recall having mentioned that area specifically to Mr. Delaria?

[fol. 260] A. Yes. He knew exactly what I was talking about.

Q. Well, I am asking you exactly what it was that you said, not what you think he might have known.

A. I asked him if he couldn't clean it up, have it cleaned up by his men.

Q. The point I am trying to get at specifically is did you mention any specific area to him when you had this conversation?

A. Yes, he—

Q. You did mention it?

A. I mentioned it, yes.

Q. Now, that is as to the conversation that you had with him at West Street?

A. At West Street.

Q. There was another conversation, was there, someplace else?

A. Yes, there was another conversation someplace else.

Q. What can you recall as to what you said to him on that occasion?

A. The same thing. I asked him if he please wouldn't clean it up or have it cleaned up.

Q. And did you mention the same general area to him on that occasion?

A. The same general area.

Q. Is that about the sum and substance of what you can recall of these two conversations that you had with Mr. Delaria?

[fol. 261] A. Yes. And I made one complaint to—at the freight house.

Q. One complaint at the freight house?

A. At the freight house.

Q. To someone other than Mr. Delaria?

A. Yes.

Q. Before we get to that one, let's make sure we have it straight about the conversations that you had with him. As I understand it, you have told us everything that you can recall at the present time about what you said to him on both of those occasions, is that right?

A. Yes.

Q. Now, how about the complaint made—pardon me—can you remember when it was that you had those two conversations?

A. No, I don't.

Q. Do you remember how far apart they were in point of time?

A. Well, they were about a month, month and a half apart.

Q. Do you remember how long previous to the incident of your insect bite?

A. No.

Q. You have no recollection about that at all?

A. No, I don't remember.

Q. How about then a conversation or complaint as you call it at the freight house, do you remember who it was?

A. Yes, it was Art, the foreman.

[fol. 262] Q. Art, the foreman?

A. Yes.

Q. Is his last name Thomas, by any chance?

A. I think it is.

Q. Art Thomas?

A. I think it is.

Q. Tell us everything you can remember about that, then, will you?

A. I complained about West Street to him, because his men—

Q. Wait a minute. Did your conversation with him have anything to do with the Columbus Road bridge area?

A. No. He had nothing to do with that area.

Q. Did he have something to do with West Street?

A. He did.

Q. Do you know of anyone else by whom complaints were made to anyone in connection with the B & O Railroad with respect to the conditions under the Columbus Road bridge, at any time?

A. Do I know—what was that question?

Mr. Hadden: Do you want to read it to him? If it isn't clear I will rephrase it.

(Last question read by the reporter.)

Q. Do you understand that or should I ask it again?

A. No, I wouldn't know of anyone—

Q. Of anyone else?

A. Of anyone else.

[fol. 263] The Court: I didn't hear the answer.

Mr. Hadden: He wouldn't know of anyone else.

Q. In so far as the bite itself is concerned that you experienced under the bridge or in that vicinity as you

claim, how would you say that would be best described, as a bite or a sting?

A. Well, I would say a bite.

Q. A bite as opposed to a sting say from a hornet or a wasp or something of that order?

A. Yes.

Q. Did it feel at all like a mosquito bite?

A. Mosquito bite?

Q. I am not trying to lead you astray. I am merely trying to find out as best I can what happened to you.

A. Mosquito bite?

Q. Did you ever have another bite or sting or whatever it might have been that felt something like this?

A. Yes—no, not like this.

Q. You never did?

A. No.

Q. Is there any description that you can give us that will help us to understand just how it was that this incident [fol. 264] felt?

A. The only description, the description that I gave.

Q. Only what you have already told us.

Mr. Hadden: I think that is all.

Redirect examination of James J. Gallick.

By Mr. Dudnik:

Q. Jim, I have just a few questions that I would like to ask you.

Offers in Evidence

Mr. Dudnik: First I would like to offer those exhibits, I want to offer them in evidence, Mr. Hadden, if I may.

I offer into evidence, if your Honor please, Defendant's Exhibit H. May I have the others, please?

I offer into evidence Defendant's Exhibit G-1, I offer into evidence Defendant's Exhibit G-2, and I offer into evidence the statements signed by Mr. Gallick, Defendant's Exhibits I-1 and I-2.

Mr. Hadden: Your Honor, before we have a ruling on that, may I have a chance to talk to Mr. Leasure? May I see them a minute, please?

Mr. Dudnik: Surely.

The Court: Without objection, Defendant's Exhibit G-1 [fol. 265] and G-2, H, and I-1 and I-2 are received into evidence.

Mr. Dudnik: Your Honor, the one exhibit which is the statement is identified as Defendant's Exhibit I-1 and I-2. For the record I want to make that correction.

The Court: It will be received.

By Mr. Dudnik:

Q. Jim, this Form 790 was not made out by you, was it, Jim?

A. No.

Q. It says, however—now that it is in evidence—nature and extent of injury: Insect bite back of left leg at knee joint, does it not, Jim?

A. Yes.

Q. And that is on Baltimore and Ohio Railroad form, is it not?

A. Yes, sir.

Q. Did you do this?

A. No, I didn't do that.

Q. It says further: "Continued working until September 12th under care of family physician. Hospitalized September 18th on orders of family physician, due to infection setting in."

Does it not say that, Jim?

A. That's right.

Q. It says: "Remarks: Walking along Lime Road to [fol. 266] West Street team track under Columbus Road bridge when I was bitten by insect inside pant leg." Does it say that, Jim?

A. Yes.

Q. Now, let's go over the statement, Jim. This is the one you admitted signing, and apparently it was on the second day of November, 1954, from here.

Do you remember who was there when you signed it?

A. Spinelli and Robinson.

Q. Are they both claim agents for the B & O Railroad?

A. Claim agents for the B & O Railroad.

Q. Were they both there?
A. They were both there.
Q. Did you write it or did they write it?
A. They—they wrote it.
Q. Do you know which of the two wrote it?
A. No, I don't. I can't say for sure.
Q. Was anybody there with you besides those two men?
A. No.
Q. Was this after your surgery?
A. Yes.
Q. Now, let's read this, Jim. It says here, "I have been in the B & O service since 1944." Did you say that?
A. That's right.
Q. "On August 10, 1954, I was working my regular job, Cleveland yard job number 2, second trick, as yard foreman."
[fol. 267] Do you recall whether you said that or not?
A. Yes.
Q. "The weather was hot, clear and dry."
Is that correct?
A. Yes.
Q. "My engine was in the number 8 track of the spur yard where it had shoved some cars and was coming out light, and I had given the engineer instructions to go to the river track and do some switching."
Is that right, Jim?
A. That's not right.
Q. Would you have said that?
A. No, I wouldn't have said that.
Q. Was that a fact, Jim?
A. No, it wasn't a fact.
Q. "While the engine was coming around I walked from the number 8 track over to the West Street team track to check the cars."
Did you do that, Jim?
A. No. I walked across Lime Road to the river track.
Q. Would you have said that?
A. No, I wouldn't have said that.

Q. All right. "I was walking on the left side of the passing siding going west and was directly underneath the Columbus Road bridge."

[fol. 268] What is the passing siding, Jim?

A. I don't know.

Q. Did you ever call that river track the passing siding?

A. No, I just was going to say—

Q. Did you say this, Jim?

A. No, I did not say that.

Q. "When suddenly I felt something sting or bite my left leg just about four inches above my knee on the back side of my leg, more to the outside."

Is that what happened, Jim, did you say that?

A. I wouldn't say to the outside because it was on the back of the leg.

Q. "I was wearing khaki trousers and when I felt the bite or sting I struck at it, could feel what felt like a large bug or insect."

Is that correct, Jim?

A. That's right.

Q. "I couldn't see it as it was inside my trouser leg."

Is that correct?

A. That's right.

Q. "But I could get hold of it through my trousers with my fingers, and squeezed it, and I heard and felt it pop under the pressure."

Is that correct?

A. Thats' right.

[fol. 269] Q. "After this occurred I could still feel the effect of it and it felt like an insect bite."

Is that correct, Jim?

A. Yes.

Q. "I remarked to my brakeman, Molnar, shortly after that, that I had gotten a bite."

Now, is that correct, Jim?

A. No, it isn't, because I don't know who the man was that I referred to. But I—

Q. Do you remember now whether it was or was not Molnar?

A. I don't think it was Molnar.

Q. You do not think it was Molnar.

"I went ahead with my work and when I got home I told my wife about it."

Is that correct, Jim?

A. That's right.

Q. "At that time it appeared to look like a mosquito bite with a small speck, white in color, in the center, with some swelling around it."

Is that correct, Jim?

A. Yes.

Q. "I had never had any skin eruptions and had had no injury in this area at any time, and this bite or sting was on a normal area of my skin."

Is that correct, Jim?

[fol. 270] A. Yes.

Q. "I had no idea what it was that bit me except that it felt like a bug. About three days later my wife told me that the bite was gathering like a boil."

Is that correct, Jim?

A. That's right.

Mr. Leasure: Now just a moment. I think I will object to these questions, "Is that correct," unless it is made clear as to whether the witness is answering that that is what he put in his statement, or whether it isn't.

Now, if it isn't, if that isn't what is being asked, I am objecting because this thing then is being used as a—

Mr. Dudnik: I am reading the statement that your claim agent took.

The Court: Counsel may read the statement. He may read it in its entirety or any part of it.

Mr. Leasure: Yes, but my point is that the question is not specific as to whether the witness is being asked if that is what he told the claim agent.

Mr. Dudnik: Well, I will make it clear from here on in.

[fol. 271] Mr. Leasure: All right, make it clear.

Q. "While at work on August 18th the sore began to drain, and I noticed it that day when I got home."

Did you tell that to the claim agent?

A. No.

Q. "On the next day I saw Dr. Heller who treated me," did you tell that to the claim agent?

A. No, I didn't say that.

Q. "I worked through September 11th when upon the advice of Dr. Heller I laid off."

Did you tell that to the claim agent?

A. No.

Q. "Dr. Heller didn't seem to be curing me, and I went to Dr. Ippolito on or about the 16th."

Did you tell him that?

A. Yes.

Q. "By that time the sore was bigger than a silver dollar, and he had me hospitalized at Marymount where I have been ever since."

Did you tell him that?

A. Yes.

Q. "At the time I got the bite I was walking along the path besides the track where we had to walk in the course of our work."

[fol. 272] Did you tell him that?

A. No, I didn't tell him that.

Q. "The pathway was clean, but the properties adjacent to the track in that vicinity owned by Sherwin-Williams and Mau-Sherwood is filthy with dead rats and pigeons."

Did you tell him that, Jim?

Mr. Hadden: Excuse me. You left out some words in reading the statement.

Mr. Dudnik: Let me get it if I did. Where did I leave them out? Let's start again.

Q. "The pathway was clean, but the properties adjacent to the track in that vicinity owned by Sherwin-Williams and Mau-Sherwood and others is filthy with dead rats and pigeons which have been poisoned and died around there."

Did you tell that to the claim agent?

A. No, I didn't tell them that because I don't know who owns the properties.

Q. Did you have any idea who owned the property adjacent to Mau-Sherwood?

A. No, I didn't.

Q. Or to the Sherwin-Williams?

A. Nor the Sherwin-Williams.

Q. "I believe that such unsanitary conditions tend to draw [fol. 273] various kinds of bugs."

Do you recall whether or not you said that?

A. No, I don't remember saying that.

Q. "From time to time I have noticed that I am frequently swatting one kind of insect or another, particularly in the neighborhood of Lime Road and West Street."

Did you tell them that, Jim?

A. No.

Q. "I can add nothing further to the cause of my trouble than what I have already said."

Is there anything in that statement about the ditch underneath the Columbus Road bridge, is there, Jim?

Mr. Leasure: I object. I object to the question. The document speaks for itself. It has been fully read.

The Court: The question will go out.

Q. Did you tell that claim agent anything about the ditch under the Columbus Road bridge?

A. I told them but he didn't say anything about Columbus Road bridge.

Q. Did you tell him that?

A. Yes, I did.

Q. And what did he say to you?

A. Don't worry, that was left out but it will be taken [fol. 274] care of.

Q. What else did he say to you?

The Court: May I have the answer?

Mr. Dudnik: "Don't worry, it was left out but it will be taken care of."

Q. What else did he say to you?

A. He said—

Q. I can't hear you, Jim. Can you answer one more question?

A. Yes.

Q. What else did he say to you, Jim?

A. He told me I would be taken care of.

Mr. Leasure: Just a moment.

Q. That you would be taken care of?

Mr. Leasure: I heard enough to object right now.

A. He told me that I would be taken care of.

Mr. Leasure: Just a moment. I am objecting to the question in the first place, without any answer, and I certainly object to the answer, the part that got out.

The Court: Will the reporter read the question?

(Following question was read by the reporter: "What else did he say to you, Jim?")

Mr. Dudnik: That is the question.

[fol. 275] Am I permitted to show the circumstances surrounding the taking of that statement?

The Court: He may answer the question.

Q. What is your answer?

A. He said that I would be taken care of, that I shouldn't worry about it.

Q. What else did he say, if anything?

Mr. Leasure: I think I will object to that. He hasn't indicated that he said anything else.

The Court: Objection to the form of the last question will be sustained.

Q. Can you remember anything else that he said?

Mr. Leasure: I am still objecting, your Honor.

The Court: Overruled.

A. No.

The Court: What was the answer?

Mr. Dudnik: "No, I don't remember."

No more questions.

The Court: Mr. Hadden, are you going to inquire further?

Mr. Hadden: I was inquiring if he wants to take a break.

[fol. 276] Mr. Dudnik: Are you going to ask him some further questions? If not—

Mr. Hadden: Just a second.

We have no further questions.

Mr. Dudnik: No further questions. Thank you, Jim.

The Court: At this time, ladies and gentlemen of the jury there will be a short recess and you may return to the jury

room, once more with the admonition that you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

[fol. 277] Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness Dr. Victor Ippolito, who, being first duly sworn, was examined and testified as follows:

Direct examination of Dr. Victor Ippolito.

By Mr. Dudnik:

(Plaintiff's Exhibits 13 and 14 were marked for identification by the reporter.)

Offers in Evidence

Mr. Dudnik: If your Honor please, at this time I should like to offer into evidence Plaintiff's Exhibit 13, which is the Marymount Hospital record of the first admission.

The Court: Marymount Hospital records?

Mr. Dudnik: Yes, for admission of September 18, 1954—Doctor, you tell me the date of discharge.

The Court: Have these been shown to counsel?

Mr. Dudnik: Yes.

The Witness: Admitted September 18, 1954.

Mr. Dudnik: Does it show the discharge?

The Witness: No. Usually they have it written right [fol. 278] there.

Mr. Leasure: What are those dates?

Mr. Dudnik: Admission, September 18, 1954. We are just getting the discharge date.

The Witness: He was discharged December 8.

Mr. Dudnik: '54?

The Witness: '54. Home tomorrow. That is signed on the 7th.

The Court: Without objection—

Mr. Leasure: Well, just a moment, if your Honor please. I think I will object to the wholesale introduction of them into evidence.

We have no objection to the identity of the records themselves; in other words, we are not insisting that the librarian be called down here to identify them.

But I am sure that there are at least some parts of the record which are inadmissible per se. Perhaps other parts are admissible.

The Court: Have you gone over the records?

Mr. Dudnik: Your Honor, I will not argue that at the moment.

Then I would like to offer also the next admission, the [fol. 279] next hospital record on the second admission, and if the Court will withhold ruling on them we will try to go over them and see what we can agree on. In the meantime I would like to have the Doctor—

The Court: The other will be Plaintiff's Exhibit 14?

Mr. Dudnik: Plaintiff's Exhibit 14 which is the Marymount Hospital record from the admission of—

The Court: The second admission?

Mr. Dudnik: Yes, the second admission.

The Witness: January 4, 1955. Discharged March 8, 1956.

The Court: The Court will withhold ruling.

Direct examination of Dr. Victor Ippolito.

By Mr. Dudnik:

Q. Doctor, you may refer to these if you have to in your testimony. Dr. Ippolito, will you please state your name in full?

A. Victor D. Ippolito, M.D.

Q. How do you spell your last name?

A. I-p-p-o-l-i-t-o.

[fol. 280] Q. Where do you live, Doctor?

A. 24100 Laureldale, Shaker Heights 22, Ohio.

Q. Are you a licensed practicing physician and surgeon in this community?

A. Yes, sir.

Q. Where are your offices?

A. 11710 Shaker Boulevard, Cleveland, Ohio.

Q. Doctor, where did you study medicine?

A. Western Reserve University.

Q. When were you admitted to the practice of medicine?

A. 1939.

Q. Following your graduation from the University did you intern in any hospital?

A. Yes, I spent four years at St. Vincent's Charity Hospital here in Cleveland.

Q. Four years?

A. Yes, sir.

Q. In what capacity?

A. The first year I was an intern, and then the second year I took a year of internal medicine, and then after that I was the surgical resident. My last year I was chief resident in surgery.

Q. When did you leave the hospital, St. Vincent's Charity Hospital?

A. 1943.

[fol. 281] Q. Following that what did you do, Doctor?

A. I went into practice at the Rose Building.

Q. And have you been continuously engaged in the practice of medicine since 1943?

A. Yes, sir.

Q. Doctor, are you a member of any medical society?

A. American College of Surgery, International College of Surgery, Academy of Medicine, Medical Library.

Q. Doctor, are you connected in any manner with any hospitals in this community?

A. Yes. I am secretary of the executive staff at Marymount Hospital, and I have privileges at St. Vincent's Charity and also at St. John's Hospital.

Q. You operate at St. Vincent's Charity Hospital?

A. Yes.

Q. And at St. John's?

A. I haven't gone to St. John's in a number of years, but, if I want to I can, yes, sir.

Q. Where do you do most of your surgery, Doctor?

A. About 95 per cent at Marymount Hospital.

Q. Are you also, Doctor, the club physician for the Cleveland Browns football team?

A. Yes.

Q. How long have you been that?

A. Since they started, about four years.

[fol. 282] Q. Doctor, I will ask you if you had occasion to see the plaintiff in this case, James Gallick, professionally?

A. Yes, sir.

Q. Can you tell me when you first saw him?

A. May I look at this, please?

Q. Yes, you can refer to all the records you have.

A. I saw him September 16, 1954. At that time I was in the Rose Building.

Q. In the Rose Building?

A. Yes, sir.

Q. Did you see him at your office?

A. Yes, sir.

Q. Did you at that time receive a history of his having had an accident?

A. Yes, sir, he gave me a history, yes, sir.

Q. What was that history, Doctor?

A. He stated that about a month before coming to my office he had an insect bite, and here I have, "in the right popliteal area," which is the back of the knee area.

Q. At that time, Doctor, following that history, did you perform an examination?

A. Yes, sir.

Q. What area did you examine?

A. I examined the area behind his leg in which he had a large ulcer. It was a necrotic foul-smelling ulcer behind [fol. 283] his knee and the back part of his leg.

Q. What is the meaning of the word necrotic, Doctor?

A. Necrotic means dead, dead tissue, not healthy tissue.

Q. Can you call an ulcer a lesion?

A. Yes, sir.

Q. What is a lesion, Doctor?

A. Well, a lesion is any disruption of the skin. It doesn't even have to be a disruption. Anything that is abnormal, that is not normal.

Even a tumor mass that doesn't have the skin broken, we can still call that a lesion, but it depends on what type.

Q. When you examined him that day did he have one or more than one lesion?

A. Just one.

Q. And did you examine his body besides that area?

A. Yes, yes, sir.

Q. Following that examination, Doctor, what did you do?

A. He was admitted to the hospital immediately, the same day.

Q. What hospital?

A. Marymount Hospital in Garfield Heights, Ohio.

Q. Doctor, I believe you said that your record shows the right leg. Is that correct or incorrect?

A. No, that is a mistake. I should have written left leg, but I put down right leg.

[fol. 284] Q. Whose mistake is that, Doctor?

A. Mine.

Q. Beg pardon?

A. My mistake. I wrote it.

Q. Doctor, when he was admitted to the hospital was he admitted as your patient?

A. Yes, sir.

Q. And from the first day of his admission tell me what you did and what you observed, and the course that he took?

A. Well, from the first day that he was admitted, of course, we take the usual blood test that we do on all patients.

Q. What is the purpose of that, Doctor?

A. It is to rule out any other diseases, systemic diseases, to know whether the man is anemic, whether he is not, whether he has a blood stream infection, a lot of reasons, whether he has diabetes.

A lot of times urine doesn't show it and you have to do blood tests to ascertain whether a man has diabetes or not. His urine may be negative but still he has diabetes.

Q. Is it fair to state, then, that your first objective was to rule out certain conditions?

A. Yes, sir.

Q. Now, did you make any tests then for you said diabetes?

[fol. 285] A. Yes, sir.

Q. Did he have diabetes?

A. No, sir.

Q. Did you make any tests for cancer?

A. Yes, sir.

Q. Did he have cancer?

A. No, sir.

Q. Did you make any tests for Buerger's Disease at that time?

A. Yes, the test we use for Buerger's Disease. He had no interference with his vascular system. He did not have Buerger's Disease.

Q. Did you make any test for systemic disease of any kind?

A. Yes, sir.

Q. What did your test reveal?

A. As far as any systemic infection, he did not have any systemic disease.

Q. Doctor, did you make any tests for blood disease such as syphilis?

A. Yes, sir.

Q. What did that show?

A. He did not have syphilis.

Q. By the way, what is ulcerative or ulcer colitis, or have I expressed the term properly?

A. Ulcerative colitis.

[fol. 286] Q. What is ulcerative colitis, Doctor?

A. Ulcerative colitis is where an individual has an ulceration of the lining of the large bowel.

Q. Did you make any tests to determine whether he had ulcerative colitis?

A. Yes, sir.

Q. What did those tests reveal, Doctor?

A. He did not have ulcerative colitis.

Q. Now, then, what did you do for him after you made your various tests?

A. Well, after—after usually trying to clean up this ulcer, we try to clean it, using continuous hot compresses, hot towels, and also put him on antibiotic drugs.

Then the first thing that we did, in any ulceration or any lesion, we took him to surgery and did a biopsy.

By biopsy we mean taking a piece of whatever you are going to examine, and send it to the laboratory to be absolutely—to try and find out exactly what you are dealing with.

Q. What did the biopsy disclose, Doctor?

A. Can I look at my record?

Q. Yes, you can. You can look at them anytime you want to.

Mr. Leasure: Doctor, do you mind giving us the dates of these things as you go along?

A. Yes, sir, perfectly all right.

[fol. 287] Mr. Leasure: It will save a lot of questions on my part if you will.

A. 9-22-54 we took a biopsy of the skin behind the left knee, and the pathological report came back "Abscess of skin."

Q. Now, following that did you do any surgery?

A. Yes, after that—that was on the 22nd. Then—

The Court: What month, Doctor?

A. September of 1954. Then on the 28th of September, the same year, we did a debridement of the ulcer of the left popliteal region in order to attempt to get this area ready for a skin graft, because it was a large lesion.

Q. What is a debridement, Doctor?

A. A debridement is that you remove all abnormal skin, even though into normal skin, to try and clear up any infection you may have, because to attempt to do a skin graft on an area that is infected or inflamed is a hopeless case.

Q. Is that an operation you perform under a general anesthetic?

A. Yes, sir.

Q. And how long did that take?

A. I would have to look at those records on the anesthetic.

Q. Well, forget that for a moment.

A. I would say offhand about an hour. I don't quite remember.

[fol. 288] Q. Following that debridement what did you do for him, Doctor?

A. Well, following the debridement, what we tried to do after that is still to use antibiotic drugs and hot compresses, to attempt to keep that area as clean as you possibly can in order to get it ready for skin grafting.

Q. And after a while did you perform a skin graft, Doctor?

A. Yes, sir.

Q. And did you do it?

A. Yes, sir.

Q. Will you tell us how you did this skin graft and what you did in that surgery?

A. Now, the debridement was done on September 28, 1954, and that area was not ready until October 12, 1954.

As I mentioned a few minutes ago, we put him on antibiotics and hot compresses, and so forth, in order to attempt to sterilize the operative field.

Q. Doctor, during that period between the debridement and the second operation, what was the progress of this ulcer?

A. Well, it was just about the same, and that is one reason we went ahead and grafted it on the 12th of October, 1954.

Q. On the 12th of October, 1954, you did a skin graft?

A. Yes, sir.

Q. Tell us what you did and how you did it?

[fol. 289] A. Well, do you want me to read my whole operative notes?

Q. Yes.

A. Well, I put down here clinical findings, which we write before we give the actual dictation of what we did.

The patient is a 53-year old white male who entered this hospital on the 18th of September, complaining of a large progressively increasing ulcer of the posterior aspect of the lower left thigh, immediately above the popliteal fossa.

That is this area here.

The patient allegedly had been bitten by an insect, and an erythematous papillar lesion arisen.

Q. Can you break those down into little words?

A. What we mean by erythematous, erythematous means red. Papillar means raised. Lesion is a sore, if you want to call it that.

Q. Proceed, Doctor.

A. This is a carbon copy, it is so hard to read.

This broke down forming a small necrotic abscess which gradually increased in size until the time of admission, at which time it measured approximately 5 by 7 centimeters in diameter, and was approximately 1 centimeter deep, and covered with a thick fibropurulent exudate.

That means necrotic and infected, call it pus, it was covered with it.

[fol. 290] Smears and cultures were taken, revealing them to be contaminated escherichia intermedium, and pseudomonas pyocyaneas.

Q. You will have to break that down, Doctor.

A. Just a different type of organisms that ulcers will contain.

The ulcer is biopsied—talking about the first operation and a pathological report was abscess of the skin.

The base of the ulcer was cleaned with repeated applications of varidase, and that is a solution and an ointment that helps healing. After surgery that is what we use.

A debridement was done at the time of the biopsy, and on the 11th of October the patient was brought to surgery for skin graft.

Now, operative notes, technique: Using a Paget dermatome; that is a large knife that we use in order to take off the skin, the skin was taken from the opposite leg which would be the right leg for skin grafting to the left leg.

Q. From what area of that right leg did you take the skin?

A. The thigh.

Q. How much of an area did you cover, can you tell us, Doctor?

A. Well, I can measure—the area?

[fol. 291] Q. Approximately.

A. About that big (indicating).

Q. Thank you. Proceed.

A. A split thickness graft was taken from the contralateral thigh, which means the opposite thigh, which would be the right.

Because of technical difficulties it was not possible to take a graft the size of the ulcer. Hence, three separate grafts were taken, three separate pieces of skin.

Q. All taken from the same right leg, then, were they not?

A. The right leg. Thes grafts were sutured together and sutured to the edges of the wound with small interrupted sutures of black silk.

Both the graft and the donor sites were covered with xeroform gauze dressing, and the patient left the operating room in good condition.

Q. Doctor, you say you sewed them with some—what do you call that?

A. Black silk.

Q. Approximately how many shall we say stitches did you make in that graft?

A. I don't have my notes. But an area of about that big (indicating). I would say at least a hundred all told, because you put them fairly close together.

Q. And was that done under a general anesthetic?

[fol. 292] A. Yes, sir.

Q. Approximately how long was he in surgery?

A. Well, the anesthetic notes, I have it there, but I would say at least an hour.

Q. Following that he went back to his recovery room I presume?

A. He goes back to recovery room.

Q. And following that?

A. He goes back to his room.

Q. Now, that was on October 12, was it not?

A. Yes, sir.

Q. And did you continue to see him then until his discharge on December 8th?

A. Yes, sir.

Q. Tell this Court and jury what progress his condition made, was it the same, getting better, or getting worse?

A. He made absolutely no progress. As a matter of fact, he became progressively worse.

Now, this skin graft that we thought was going to heal, that broke down just like you would take butter and heat it, just melted right away.

And of course then we were confronted with our ulcer again.

Q. Was it larger this time, after the breaking down?

A. Not at the time the skin graft did not heal. But en-

[fol. 293] suing days this ulcer of course became larger. And once again it became infected and once again became more necrotic.

Q. Doctor, when this skin graft broke down what was the appearance of that ulcer after the breaking down of the skin graft?

A. The appearance was practically the same as it was before we even attempted to do a skin graft.

Q. Doctor, have you an opinion whether this condition was painful?

A. It is excruciatingly painful at all times. This man was kept under sedation, demerol, which is a narcotic equivalent to morphine.

We don't use morphine as much as we used to. We use demerol, we use codeine, at all times.

Q. Doctor, at that time did it give off an odor?

A. Not a distinct odor, although it had an odor that it was infected, yes. But no specific odor, I mean, some infections you can smell them and right away you know what type of an infection it is. This had—

Q. What happened in, say, November, what was his condition in November of that year while he was in the hospital?

A. Would that be the 10th month?

Q. Yes.

The Court: The 11th month.

Q. November would be the 11th month.

[fol. 294] A. Well, before that, if you don't mind—

Q. No, proceed, please.

A. On October 27, 1954, we took him back to surgery, and because he developed another mass, a swelling on the left side of his neck—

Q. What area, Doctor?

A. The left side of his neck.

Q. What was the appearance of that mass and swelling?

A. This was a hard, very tender, reddened area of his neck.

Q. And how did this thing progress?

A. Well, we took this patient to surgery, and if I may read the operative notes—

Q. Yes, you may, Doctor.

A. This patient has a rather firm mass on the left side of the neck, smaller than a small almond.

This lesion in the neck was completely removed by excising it, going well beyond the margins of the tumor mass, to attempt to get away from any closeness to this tumor mass, with the idea that maybe we could clear this up.

The tumor mass was found to involve the subcutaneous tissue, that is the fat tissue that we have, of the neck, down to the muscle.

It even involved the fascia, because underneath the fat tissue you have fascia, what we call fascia, and underneath that you have the muscle.

[fol. 295] So this involved not only the skin but the fat tissue and [illegible] fascia down to the muscle.

So it was a fairly deep tumor mass.

Q. Were there any other lesions that appeared besides the two you have already talked about, Doctor?

A. Yes, sir.

Q. Will you tell us what they were and describe them, please?

A. This patient was then brought back to surgery on November 23, 1954. May I read all of it?

Q. Yes.

A. The patient is a 53 year old white male who has had a lengthy hospitalization here as a result of multiple ulcerations of the skin due to pyoderma-gangrenosa, specific etiology unknown.

These lesions have been indolent and have been progressive and have refused to respond to any form of medical therapy.

Because excision previously, the last operation, of an early lesion for purpose of biopsy resulted in primary healing, that is, of the neck, it was felt that some hope might be offered by complete excision of these indolent ulcers, and also in the hope that primary healing might occur in these locations as well.

Q. Now, Doctor, did you take a biopsy of the area around [fol. 296] the neck?

A. Well, he had these other areas over the rest of the body, that is what is in the rest of it, if I may read this.

Q. Did you take biopsies of all of them?

A. Yes, we took biopsies and tried to completely remove them with the hope that they would heal, but—

Q. Did any of them prove to be cancer?

A. No, sir.

Q. Doctor, what was the next surgery, if any, your performed on this man?

A. That is the last surgery that we performed in this hospital stay.

Q. On the first admission, I believe you are talking about?

A. Yes.

Q. Doctor, he was discharged on December 8, 1954. In what condition was he discharged?

A. Well, because of his tremendous lengthy hospital stay and because we thought that possibly if this man went home that at least he can try at home what we were attempting to do in the hospital, and send him home, but we had to readmit him very shortly after his first discharge.

Q. Doctor, at the time of his discharge in December of 1954, can you tell us whether or not Jim Gallick was suffering pain?

A. Yes, sir, all the time.

Q. He came back to the hospital in approximately three [fol. 297] weeks, did he not?

A. May I look at these, please?

Q. Yes.

A. He came back January 4, 1955.

Q. That is December 8th to January 4th, a little less than a month?

A. Yes, sir.

Q. Was he your patient again?

A. Yes, sir.

Q. Will you tell us his appearance on January 4, 1955, with relation or as compared to his appearance when he left the hospital in December of '54?

A. Well, even in the short time his condition became progressively worse, I mean, he had these ulcers and he had a number of ulcers, but particularly this large one he had behind his left leg, and he was beginning to get what we call contractures, because the ulcers were starting to erode down deep into the muscles and down into the tendons, and what we mean by tendons is these things that

control our fingers, that sort of thing, of the back part of his leg. And he was keeping his leg in that position.

Q. What did that cause to happen to that leg, Doctor?

A. Well, there is no doubt that when you have that sort of thing you get what we call an atrophy of muscles, I mean, these muscles start to get smaller and smaller and smaller. [fol. 298] His infection started to erode or eat away his tendons which we have to have in order to move our leg.

Q. Were you able to see that visibly in looking at that ulcer?

A. Yes, sir, no question about it.

Q. Describe what you saw, Doctor?

A. Well, he had this large ulcer of his leg, which you could see down to muscle and also see his tendons, as I explained these things here, you could see those, and some of them were even eaten away. You see the ends of them, shreds.

Q. Doctor, before that, you mentioned the term pyodermagangrenosa.

A. Yes, sir.

Q. Will you tell us what that is, Doctor?

A. Pyoderma means pus. Gangrenosa means gangrene of tissues, infected dying tissues.

Q. And was that the diagnosis made at the time, during the time of first hospitalization?

A. Yes, sir.

Q. What if anything did you do for him by way of treatment after he came back, Doctor?

A. We tried to do everything that we possibly could for this man. I don't think there is anything that we did not try.

[fol. 299] We took numerous cultures of this ulcer. We gave him supportive treatment, as far as transfusions and fluids in his veins.

We tried all of the antibiotics that at least at the time that we knew about.

Q. Tell us about these transfusions, Doctor, did he have many transfusions?

A. I don't remember offhand, but he had a number of them, yes.

Q. What is a transfusion?

Just an injection of blood plasma?

A. It is an injection of whole blood. We take it from another person of the same type that he has, and inject it into a vein, yes, sir.

Q. You say he had many of those?

A. Yes, sir.

Q. Did you have consultation with other doctors?

A. Yes, sir. I had Dr. Kozikowski who is a dermatologist who confirmed what we were doing was right, or if he had any other ideas of something possibly that we were not doing that he could help out.

Q. And at your request did Dr. Kozikowski see him with you on many occasions?

A. Yes, sir, he was my patient at all times, and I ran the show, I mean, he was my patient and these other doc-
[fol. 300] tors were in for—

Q. Did he agree with you in your treatment and the type of treatment that you performed?

Mr. Leasure: I think I will object, your Honor.

A. Yes, sir.

The Court: Just a moment. The objection will be sustained and the jury will disregard the last answer.

Mr. Dudnik: Thank you, Judge.

Q. Did Dr. Kozikowski do anything different for him than you did during the time that he saw him?

A. Not actually do anything different. We tried all these different drugs, and he presented Mr. Gallick to a dermatological society meeting in which the well-known dermatologist—

Mr. Leasure: I will object.

Mr. Dudnik: Just a moment, there is an objection, Doctor.

The Court: The objection is sustained.

Mr. Dudnik: And the Judge is sustaining it which means you can't tell it.

Q. Doctor, he was in the hospital the second time about 14 or 15 months, is that about right?

A. Yes, sir, about that.

[fol. 301] Q. And was he your patient during that entire period?

A. Except for the times I went on short vacations, when I was with the Cleveland Browns out of town and I left other doctors.

Q. Other than that was he your patient?

A. He was my patient.

Q. Until the time he was discharged the second time?

A. Until the day he was discharged, yes, sir.

Q. Now, can you summarize or tell the jury the progress, what you did for him during that 14 or 15 months by way of treating, did you do any more skin grafts?

A. Yes. His second admission, further biopsies were taken. As a matter of fact, because I was out of town or I was going out of town, which I planned my vacation a long time before, Dr. Kozikowski wanted to do some more biopsies, and I told him to go ahead and do it, which he took him to surgery and took many skin biopsies. But the results were always the same as the first hospital admission.

Q. Now, Doctor, was there any further skin grafting done by you?

A. No, sir.

Q. Doctor, as time progressed in the hospital did Jim Gallick get better, stay the same, or get worse?

A. Mr. Gallick got progressively worse, except for maybe a few days at a time where in our own mind we thought [fol. 302] maybe he was getting a little better.

But his progress was downhill from the first day, the first admission that he came in the hospital.

Q. Was his pain more severe as time went on?

A. His pain was always severe. As a matter of fact, it was more severe on the second hospital admission than towards the end, because he got more ulcerative lesions on the other parts of the body.

So he had quite a portion of his body to contend with as far as open lesions, open sores of the skin.

Q. What about the odor of those lesions as time went on?

A. Well, as I said before, they had no distinct odor. They had an odor to them, but no distinct odor of any one type, like some cases there is one odor and you can always remember it. This was a little bit different.

Q. Doctor, did you at the request of did you send any reports or progress reports of his condition to the B & O Railroad?

A. Yes, sir.

Q. And at whose request did you do that?

A. At their request. They asked me about them.

Q. Who asked you about them?

A. Can I look?

Q. Yes.

A. One was D. A. Wyner, M.D., medical examiner. He [fol. 303] asked me for reports on Mr. Gallick's condition.

Q. Anyone else, Doctor?

A. Yes, sir. Mr. A. L. Williams, and I am sure he was the District Claim Agent, Room 513, Metropolitan Building, Akron 8, Ohio.

Q. Did he ask you?

A. Yes, and I wrote him a report.

Q. How many reports altogether did you send to the Baltimore and Ohio Railroad?

A. Three.

Q. Now, Doctor, Jim Gallick was discharged from Marymount Hospital the second time some 14 or 15 months after his second admission; can you give us the date of the discharge?

A. He was discharged March 8, 1956.

Q. What was his condition on the day of his discharge?

A. His condition was poor.

Q. Did you see him after that professionally?

A. No, sir.

Q. Did you learn where he went after that?

A. Yes, sir.

Q. Where, Doctor?

A. Cleveland Clinic, and eventually Highland View Hospital.

Q. Doctor, did you at my request examine his right arm today?

A. Yes, sir.

[fol. 304] Q. And will you describe to the jury what you saw?

A: I examined Mr. Gallick's arm at lunchtime at the request of Mr. Dudnik, and his right upper arm was wrapped with a sort of muslin dressing, and underneath that his upper arm showed he had a lot of scar tissue, and he also had an ulcerative area on the outside of the arm, outer portion.

Q. How did that compare with the first ulcer that you saw on the back of his left leg, Doctor?

A. Of course, it wasn't the size. It didn't have the depth of the ulcer when I first saw him. But it looks like some of the ulcers in which he had on other parts of the body that started the same way.

Q. Doctor, after seeing his arm today, can you give us a prognosis as to what is the future of that arm? You can answer that yes or no, whether you can give us a prognosis?

A. Yes, I think I can.

Q. What is your prognosis?

A. My prognosis is based on knowing what Mr. Gallick originally started with in 1954, and seeing what happened to those two legs, and seeing an ulcer on his arm now, I don't see why I should think that the future holds anything but an amputation for him.

Q. Of the arm?

A. Of the arm.

Q. Doctor, the condition that you saw him in today, is he [fol. 305] a patient requiring hospital care and hospitalization?

A. Absolutely.

* * * * * * *

[fol. 343] The Court: First, may I ask, are the hospital records offered in evidence?

OFFERS IN EVIDENCE

Mr. Dudnik: Your Honor, I am going to do that at this time.

At this time I offer in evidence Plaintiff's Exhibits 13 and 14, which are the Mary Mount Hospital records, in full,

and Plaintiff's Exhibit No. 15, 16, and 17, which are the Cleveland Clinic records in full.

Mr. Leasure: No objection, your Honor.

(Plaintiff's Exhibits 13, 14, 15, 16 and 17 were marked for identification by the reporter.)

The Court: Without objection they will be received. Plaintiff's Exhibit 13 and 14 are the Marymount Hospital [fol. 344] records?

Mr. Dudnik: That's right, your Honor.

The Court: And Plaintiff's Exhibits 15, 16 and 17?

Mr. Dudnik: Yes, your Honor.

The Court: Those are the Cleveland Clinic records?

Mr. Dudnik: Yes, sir.

The Court: Ladies and gentlemen of the jury, you will remember at the close of our session yesterday a hypothetical question was put to the witness, Dr. Ippolito, to which an objection was raised.

I want to say that the hypothetical question and the objection raised by counsel for the defendant have been considered by the Court, and a new hypothetical question will now be posed by counsel for plaintiff.

Thereupon Dr. Victor Ippolito resumed the witness stand and was further examined and testified as follows:

Direct examination of Dr. Victor Ippolito, resumed.

By Mr. Dudnik:

[fol. 345] Q. Dr. Ippolito, I want you to assume that James Gallick, a man who in August of 1954 was 53 years of age, and had no prior diseases with the exception of chicken pox; that the only other mishaps that he had were three or four minor accidents before August of 1954.

That he never had skin diseases, skin eruptions, allergies, or any other illness of any kind.

That prior to 1954 while eating during an argument he swallowed something which caused him pain in his chest

and he called on a doctor who saw him I think once and perhaps twice, from which he recovered.

Doctor, assume further that this man went to work for the B & O Railroad in 1944 as a brakeman and switchman, that all his life he had done hard manual work. The longest job before that having been with the Hunkin-Conkey Construction Company in construction work.

That from 1950 to 1954 he worked very steadily on one job for the B & O Railroad, known as the Downtown Number 2 job, which consisted of switching cars in the flats of Cleveland; that in that area there was a bridge known as the Columbus Road bridge, which extended in an easterly and westerly direction; under which ran a single track or two rails which extended in a northerly and southerly direction.

That for many years prior to August 10, 1954, there existed underneath the bridge a swamp or ditch area which [fol. 346] constantly contained water, in which there were lying rats, dead rats, and dead pigeons, sometimes or most of the time between twenty and thirty, in this stagnant water.

That in and around these dead rats and dead pigeons there crawled and flew bugs and insects of many kinds and description.

Assume further, Doctor, that farther down that river track, or to the south, there were areas where other dead rats and pigeons were laying around, as well as farther up the bridge toward the north.

Assume further that the greatest concentration of dead rats and dead pigeons was in that water, in the ditch, which ran alongside one of the rails, and was directly underneath the bridge, the Columbus Road bridge.

Assume further, Doctor, that this was called to the attention of employees of the company on occasions.

Assume further, Doctor, that on occasions the road men or track men had attempted to clean that area out, but without success.

That on approximately August the 10th of 1954, the exact date being unknown, Jim Gallick had occasion to walk underneath the Columbus Avenue bridge from a

southerly to a northerly direction, that he walked on the left side or westerly side, or opposite from where the ditch was which contained these vermin which I have spoken about; that between him and this ditch were these two [fol. 347] rails of the single track.

That he stopped underneath the bridge for the purpose of determining where his engine was, and therefore in doing that instead of heading north as he was in walking, was then headed south.

And that as he was standing there for about 30 to 45 seconds he saw his engine, decided to continue to proceed underneath the bridge, had started to turn north again, made one or two steps in a northerly direction, when he felt a sting or bite behind his left thigh about four inches above the knee.

That he touched, grabbed it with his hand, an object with his hand, that he squeezed it, that he heard it and felt it pop, that he did not see it, but it was about the length of three of his fingers, and as big around as his little finger.

That after he squeezed it and it popped, he felt it roll down the back of his pant leg.

Assume further, Doctor, that that sting or bite he continued to feel it, he was conscious of a pain there at all times until 7:00 that evening, this having occurred approximately 3:30 in the afternoon, about one-half hour after he started his daily tour of duty.

That about 7:00, or four hours later, when he had his dinner, either shortly after or before, he lowered his pants [fol. 348] in a dressing room of some kind, could not see this area where he felt the pain and where he was bitten, took some soap and water and washed it, continued however on his tour of duty until 11:00 that night.

Doctor, assume further that at 11:00 or 11:30 when he came home he lowered his trousers and showed his wife the area where he felt this bite, which continued shall we say to bother him, or pain him, but not too great.

That she described it to him as a raised area, red in appearance, and I think a pink center or white center; that it was small, that it gave neither him nor her any concern.

or no concern, that he washed it that day, that night, continued to work the following day.

The next morning she saw it again and it appeared slightly larger. It gave him nor her any concern, and he continued to work for some four or five or six or seven days, washing it and treating it himself.

That about six or seven days later, the area then appeared the size of a half a dollar, was raised and pink, with a head on it, and while he was taking a bath this area with the head on it broke open, and that then he went to see a doctor.

Assume further that the doctor saw this area, does not recall or has no record of whether he took a history of how it happened or not, gave Mr. Gallick an injection of penicillin [fol. 349] with some ointment dressing, and told him to come back in a couple of days.

That he did come back in a couple of days, Doctor, when the body was again injected with penicillin, further dressing of some kind, and told to come back, which he did.

That he came back on some four or five occasions, the last occasion being I think September 7th of 1954—I don't have it at the moment—that at that time the doctor examined and decided it was resisting treatment; that rather than improving it was getting worse, and recommended that he be hospitalized for further studies.

Assume further, Dr. Ippolito, that following that recommendation Mr. Gallick did not go back to the doctor, but then came to see you.

Assume further that you saw him on the date that you said you saw him the first time, where he gave you the history of an insect bite, and that you put him in the hospital, performed the work that you told us about, performed the operations, that he wasn't getting better, that he was in the hospital some three months the first time, that he was gone home for about three weeks, came back and stayed some 14 or 15 months, during which time you treated him as you described, and that many other lesions occurred on the body.

Assume further, Doctor, that his condition was getting progressively worse; that the lesions in his leg were so

[fol. 350] deep that you could see the tendons and muscles, some of which were torn, that he had atrophy, and that you sought consultation, and that all the medication and treatment that you had given him did not improve his condition.

Assume further, Doctor, that shortly after his discharge from the hospital the second time when he was no longer your patient, he entered the Cleveland Clinic as a patient of the Cleveland Clinic.

That there many operations were performed, that he was there for some two years, the exact date which is not known to me at the moment, or not readily in my mind at the moment;

Assume further, Doctor, that after these many operations, in May of 1957 one leg was amputated with a short stump below the hip, and approximately a year later—I having told you yesterday a month later—that approximately a year later the other leg was amputated.

Assume further that in July of 1958 he went directly from the Cleveland Clinic to Highland View Hospital, where he has been a patient ever since.

Assume further, Doctor, that you examined him today, and that you found an area on this right arm which was necrotic, which was as you described, and which looked like some of the areas of infection that he had while he was your patient.

Assume further, Doctor, that he is a hospital patient [fol. 351] now, and will be one, and that he is in a condition where he requires hospitalization.

Assume further, Doctor, that it is your professional opinion that the right arm will have to be amputated.

Now, Doctor, taking everything that I have given you in this hypothetical question to be a fact, based on that, based on your treatment and observation of this man, do you have an opinion based on reasonable medical certainty as to whether or not there is a direct or proximate causal relationship between the ditch containing the water, stagnant water, the dead rats, the dead pigeons, the insects flying around it, the bite or sting which he sustained on that day, and his present condition as you have seen him

today; and I will ask you to answer that question yes or no, whether you do or do not have an opinion.

A. Yes, I do.

Q. Doctor, what is your opinion?

A. I think—

Mr. Leasure: Just a moment, just a moment. Now at this time I am entering an objection, both generally and for the specific reasons stated yesterday.

The Court: Objection overruled.

Q. You may answer.

A. My professional opinion is that there is a direct cause [fol. 352] between the filthy, infected swamp, or area of stagnant water, which Mr. Gallick was working nearby, and the insect bite to his left leg, and the conditions that followed thereafter, and by that I mean the amputations of both of his legs, and in my opinion, professional opinion, in the future his right arm will have to be removed.

Mr. Dudnik: You may cross-examine.

Cross examination of Dr. Victor Ippolito.

By Mr. Leasure:

Q. Dr. Ippolito, if you can't hear me, I know you have noise behind you there, just let me know.

A. That is all right.

Q. Now, you have been asked a hypothetical question which covers some nine pages, and you have been asked to assume numerous facts?

A. Yes, sir.

Q. I want to ask you this one question about that. Are all of the facts that you were asked to assume necessary for you to reach the opinion that you have just expressed?

A. Well, Mr. Leasure, you know as well as I do, it is a very long question, and I didn't bother to listen to every word whether this man was standing going north or going south; or where he was going. I picked up what in my professional opinion were the pertinent facts, where the man [fol. 353] was working, the conditions in the area where he

was working, the condition of the water as Mr. Dudnik told me, and I assume he knows the facts and I remember them, yes.

Q. So I take it then you are telling us that not all the facts stated in the question were necessary for your opinion?

A. The question of going east or going west, whether he was standing there—

Q. Will you just answer my question yes or no?

Mr. Dudnik: Your Honor, I think he has answered the question.

Mr. Leasure: We have already had an explanation. I would like to have a direct answer now if I may.

The Court: He may answer if he can.

A. Yes or no?

The Court: If you can answer yes or no.

A. Will you restate your question, please?

Q. The question is: I take it then that all the facts assumed were not necessary for you to reach your opinion?

Mr. Dudnik: The Court says you can answer that yes or no, if you can. And if you can't, answer it your own way.

A. May I answer it in my own way? I can't say yes or [fol. 354] no, because some of them were pertinent facts that I assumed, and others that—

Q. That were not pertinent?

A. That were not pertinent, as what direction was he walking.

Q. That answers it. Doctor, did you ever discuss Mr. Gallick's case with Dr. Heller?

A. No, sir.

Q. You understood, did you, that Dr. Heller had treated him before he came to you?

A. I only knew that he had seen another doctor before I saw him, but—as a matter of fact, I don't even know who Dr. Heller is.

Q. Did you ask Mr. Gallick who the other doctor had been?

A. No, sir.

Q. Weren't you interested in that?

A. I would say that 99 out of a hundred patients who come to my office that have been to other doctors, I never ask them if they were to other doctors.

Q. Were you interested in determining whether any other doctor had medical information which might be relevant to this particular case?

A. At the time that I saw Mr. Gallick, I was not interested. I was only interested in the history that he gave me and what I found.

[fol. 355] Q. So you proceeded then entirely upon the history that Mr. Gallick gave you?

A. Yes, sir.

Q. And you did not check with Dr. Heller?

A. No, sir.

Q. Now, Doctor, I am not sure I am clear, as I understand it, the field of medicine has different specialties, is that correct?

A. Yes.

Q. Quite a few, as a matter of fact, in this day and age?

A. Too many.

Q. Are you a specialist in a particular field of medicine?

A. General surgery.

Q. General surgery?

A. Yes, sir.

Q. That does not include the field of dermatology?

A. No, sir.

Q. That is a separate specialty, is that correct?

A. Yes, sir, yes, sir.

Q. And how about the field of internal medicine?

A. No, sir, I am not a specialist in that.

Q. That is a separate field, also?

A. Yes, but any good surgeon, good surgeon, should have the knowledge of internal medicine, and also some knowledge of skin diseases that pertain to his field.

[fol. 356] Q. You have a general medical knowledge of the entire field of medicine, do you not, as a doctor?

A. Yes, sir.

Q. But what is the specialty of internal medicine, as such, as a specialty?

A. Of internal medicine?

Q. Yes. Is it diagnostic of systemic diseases?

A. It is not only diagnostic, but the treatment of systemic diseases.

Q. Now, on the subject of insects, do you hold yourself out as a specialist in that field?

A. No, sir.

Q. I take it you do not have any specialized knowledge as to the particular kinds of insects or their nature, their habits, and so forth?

A. No, sir, I do not.

Q. Do you know of any insect in this area of the country that measures about one-half inch by two inches, that is known to attack human beings?

A. As I mentioned before, I am not a specialist in insects. Therefore, I can't answer that.

Q. Now, I notice you were referring to certain records yesterday, Doctor, as you testified?

A. Yes.

Q. Were those your office records?

[fol. 357] A. Just these here.

Q. May I look and see just what it was?

A. Yes.

Q. Are these your office records?

A. Yes, sir.

Q. Fine. May I just glance over them a minute?

Doctor, do you have an entry in here someplace that you put down when Mr. Gallick first came to see you?

A. Yes. It is on the top of that first page on the right-hand corner.

Q. I see you put down a history here, Doctor. But did you put down any entries as to what you found concerning his condition? I see you have this entry, "Man has very large ulcer," and something about admission to Marymount.

Is that the extent of the entry you made at that time?

A. Yes, sir. When there is an acute lesion, I just put down the facts as I see them and admit him to the hospital.

Q. Did you make any smear or culture before you put him into the hospital?

A. No, sir. I knew he was going immediately into the

hospital as an emergency case, and those smears and cultures were all taken at the hospital.

Q. Were you able to tell—now this is before you got him into the hospital—were you able to reach any medical conclusion as to the type of infection that he had there in his [fol. 358] leg when you first saw him?

A. All diagnoses are made by the history a patient gives you and also what you find on physical findings.

Q. I am asking you about what you found on physical findings.

A. I found, the history of course, the diagnosis is always made by history plus physical findings.

Q. Doctor, will you just answer my question. I am asking you whether you could tell by looking at it, whether you reached any conclusion from looking at it and examining it, as to what infection was there?

A. I had an impression, I had an impression at that time of a large ulcerated lesion behind the leg.

Q. Doctor, we will make faster progress if you will just answer my question.

Mr. Dudnik: I submit, your Honor—

Q. Because there are many things I will come to that will cover perhaps what you have in mind.

Mr. Dudnik: I submit, your Honor, that the question has been answered.

Q. I am asking you about the type of infection. Did you reach any medical conclusion based upon your observation and examination without reference to history now, as to what if any kind of infection he had at the time he first saw you?

[fol. 359] A. That would be impossible to do at that time, because I had no cultures or anything else. I made a diagnosis of an ulcer of the leg.

Q. All right. At that time do I take it, then, that you did not reach any conclusion as to whether that ulcer was—well, strike that, we will come to that later.

This question, however, Doctor: At that time did you find in Mr. Gallick from your observation of his condition

any sign or symptom indicating any toxin or poison from any insect or any animal of any kind?

A. The patient probably was in my office only a matter of twenty minutes, or half an hour. I saw the ulcer, and to attempt for me to tell you that I excluded all possibilities of toxins and syphilis and diabetes and everything else in my office, no. That is one reason why I admitted this man to the hospital the same day.

Q. Now, the question is, Doctor, at the time he was in your office, did you see any sign or symptom in him which indicated to you the presence of any toxin or poison in his system?

A. Not that I could determine from appearance.

Q. Now, after he got into the hospital, just to round out that question, after he was in the hospital did you see any sign or symptom in Mr. Gallick which would indicate the presence in his system of any toxin or poison?

[fol. 360] A. What do you mean by that question?

Q. Well, let's approach it in this way: Does a mosquito inject something into the body which causes swelling?

A. Yes.

Q. Does a honey-bee, for example, inject something into the skin which causes swelling?

A. Yes, sir.

Q. Is that in the nature of a toxin or poison from the insect?

A. You could call it that, an allergic reaction at that time.

Q. Well, it is a type of venom, isn't it, injected from the animal itself?

A. A type of it, yes, sir.

Q. That is what I am referring to. Perhaps I should say venom.

A. No, the reason—the reason I couldn't answer that yes or no is for the simple reason I saw this man approximately one month from the time that he was bitten, and I saw him with a large ulcer.

Q. You made no attempt to check with Dr. Heller to find out what he had observed?

A. No, sir.

Q. Now, we have in evidence here, Doctor, the Marymount Hospital records, and as I understand it, those records [fol. 361] start about two days after you first saw this man. Is that correct?. You saw him on September 16th, according to your office record here. You might want to look at them.

A. September 18. 1:30 p.m.

Q. So he was admitted two days after you first saw him?

A. Yes.

Q. Now, I want to get this matter established, Doctor. From my observation of those hospital records, they are rather voluminous. Now, can we agree that those Marymount Hospital records contain entries of all medical facts and findings which are considered relevant and of importance to Mr. Gallick's case?

A. I would think so, without reading it all.

Q. During the time that he was in the hospital?

A. I would believe so.

Q. That is one of the purposes—

A. To the best of my knowledge.

Q. Doctor, you are familiar, or you were familiar with those records; as a matter of fact, many of the entries are in your own handwriting, aren't they?

A. Yes, sir.

Q. And you were in charge of the case during the time he was at Marymount?

A. Yes, sir.

Q. That is one of the purposes of hospital records, is it [fol. 362] not, to contain all relevant and important findings, and entries by the doctors and other people connected with the case?

A. They should be in the records.

Q. All right. As far as you know, all such facts were included in those records, is that correct?

A. Yes, sir.

Q. Now, a couple of things, Doctor—getting away from the hospital record for the moment—can we agree that the field of medicine is an in-exact science, as distinguished from mathematics?

A. No, I won't agree to that.

Q. All right, let me ask you this, then: Are there many

questions and problems having to do with the human body, the answers to which are still unknown to medical science?

A. Yes, that I will agree to.

Q. There are many of them, aren't there?

A. A number of them. I won't say many.

Q. What is the situation, Doctor, as to the human body when we are children up to a certain age, does the human body grow and develop to a point, and then stop?

A. Yes.

Q. At about what age is that?

A. It depends on individuals. Around 16, 17. It varies with certain individuals. Some 18.

[fol. 363] Q. When that process stops, what starts to happen, an aging process?

A. Well, yes, we all get a little bit older, if you mean it that way.

Q. Well, I am just trying to find out if there really are two areas of human life, one where you grow and develop and reach a stopping point, and then—

A. You start to deteriorate?

Q. Then you start to deteriorate. Do you agree with that?

A. Well, I would have to agree with that, with certain reservations, I guess.

Q. I am speaking generally now, so we can get the overall picture?

A. Yes, all right.

Q. Now, as we deteriorate from age, in our late teens, or whatever it is, our bodies are constantly changing, are they not, in one way or another?

A. Certain parts of our bodies are changing, yes. Certain parts. Not all.

Q. And certain conditions will develop at certain times during later life for the first time, is that correct?

A. Can you be a little more specific about that?

Q. Well, we just get into problems if I pick out one or two examples. I am trying to cover generally. Well, let's take the subject of cancer. It is not unusual, is it, for people [fol. 364] in later life to suddenly develop a cancer somewhere?

A. Yes, but they can develop them shortly after birth, too.

Q. Oh, it is possible, yes.

A. More likely so as you mention, as we get older, certain types of cancer are a little more common in later life than they are in early life. That's true, yes, sir.

Q. And the body chemistry changes from time to time, doesn't it, what little is known about it?

A. It changes slightly, depending mainly, not when the patient is in good health, as our body chemistry changes to a varying degree. It is only in people who are ill, where your body chemistry changes a great deal.

Even a patient, a good many times, almost at death his body chemistry, as far as we know, chemically speaking, does not have to change.

Q. Of course, it doesn't have to, but oftentimes it does, do you agree?

A. It may, it may.

Q. Not only on the subject of cancer, but many many other conditions and diseases will show up as people progress and get older, forties, fifties, sixties, is that correct? I don't want to burden this point but I do want to establish it.

A. Speaking in generalities, I would rather that you speak on specific things because I could better give you an [fol. 365] answer to that. If you are talking about let's say diabetes that may show up when a man is fifty years old, that is, you pick it up at fifty, but did that man have it when he was twenty, if you did a thorough enough search?

Q. In other words, you think in the case of diabetes, a man may have it and the doctor doesn't find it?

A. And not find it, that is possible, yes.

Q. That same thing generally is true with other conditions, is it not, a person may have it and the doctor just doesn't find it at that time?

A. It depends on how thorough a doctor is.

Q. And how far the condition has progressed?

A. I will agree to that.

Q. Now, I will call upon your testimony of yesterday, according to my notes you said that this man, Mr. Gallick,

was suffering from pyoderma gangrenosa; did I understand you correctly?

A. Yes, sir.

Q. Now, I think it important that we try to find out a little bit more of what that means. Is that term, pyoderma-gangrenosa, a medical term that is recognized by doctors, including dermatologists, as a description of a specific or particular condition?

A. I believe it is, yes, sir.

Q. So when a doctor says pyoderma-gangrenosa, and an- [fol. 366] other doctor wants to find out more about it, he can turn to that heading in certain medical books and see what is said about it there, is that correct?

A. He can, yes, sir.

Q. Now, with that in mind, I want to ask you if you agree with this definition of pyoderma-gangrenosa as contained in a book entitled "Introduction of Dermatology," by Sutton and Sutton, fourth edition: "Pyoderma—"

Mr. Dudnik: Just a moment, there is an objection, your Honor. He hasn't laid the foundation. He hasn't asked whether the Doctor is familiar with the book, and he cannot ask that question unless the Doctor knows the author, has read the book, and either agrees or disagrees with it.

Mr. Leasure: I don't agree with that at all.

Mr. Dudnik: That is the law.

The Court: I think the Doctor testified, he used the term pyoderma-gangrenosa yesterday. I think the foundation was laid to ask the Doctor questions concerning the term.

Mr. Dudnik: Yes, your Honor. However, it is my contention that while he can ask him any questions regarding [fol. 367] his definitions, he cannot ask him whether he agrees with a definition written by another doctor, unless he lays the foundation as to whether he has read that doctor's opinion, and either agrees or disagrees with it.

You cannot cross-examine about a book or regarding the book which the witness has not read and knows nothing about.

He must first ask him if he knows about that book, whatever book he is reading from, and if he doesn't know about it, your Honor, he cannot ask him whether he agrees or disagrees with it.

Mr. Leasure: I don't agree with that at all, your Honor, because he can agree or disagree whether he ever read the book or not.

Mr. Dudnik: I think he has to lay the foundation.

The Court: I will permit counsel to ask the question.

Q. Do you remember the first part of the question now, Doctor?

A. No, sir.

Q. The question is whether you agree with this definition of pyoderma-gangrenosa as contained in the book entitled "Introduction to Dermatology," by Sutton and Sutton, fourth edition: "Pyoderma-gangrenosum, one of several [fol. 368] sloughing ulcers, succeeding upon red nodular lesions in persons with chronic debilitating internal infection. Improvement dependent on internal condition."

Do you agree or disagree with that?

A. I do not agree with that in its entirety, just in debilitated individuals that you can get pyoderma-gangrenosum, no, sir.

Q. Further on in the same work, do you agree with this statement: "Ulceration is co-related with the internal debilitating infection. The mechanism of this is unknown."

Mr. Dudnik: May I make an objection for the record?

The Court: Objection overruled.

Mr. Dudnik: Exception.

Q. Do you agree or disagree with that?

A. I don't agree with that in its entirety.

Mr. Dudnik: May I have the author, sir?

A. Sutton and Sutton.

Mr. Leasure: It was read from Sutton and Sutton.

Q. Well, let's take another one, Doctor, and see whether you agree or disagree here.

The Court: May I see counsel?

* * * * * * *

[fol. 372]

STATEMENT BY THE COURT

The Court: Ladies and gentlemen of the jury, since this Court has permitted Dr. Ippolito, an expert, to state his opinion, there is brought into this case the entire extent of his knowledge of medicine, and thereby his knowledge of the literature on that subject.

[fol. 373] The Court has ruled that it is proper that he be cross-examined as to that knowledge, and therefore is permitting recognized medical books or treatises to be used for the purpose of testing Dr. Ippolito's knowledge, and the accuracy of his opinions, whether he relied on these books directly, indirectly, or not at all.

These medical books and treatises, though recognized as standard authorities on the subject to which they relate, will not be admitted in evidence to prove the truth of the statements contained therein.

Cross examination of Dr. Victor Ippolito, resumed.

By Mr. Leasure:

Q. Doctor, at the close of this morning's session I started to ask you about a book entitled "Diseases of the Skin" by Ormsby and Montgomery. I want to ask you if you agree with this statement contained at Page 403 in that book under the heading Pyoderma-gangrenosum: "Under this title Brunsting, Goeckerman, and O'Leary described early furuncle-like lesions which rapidly broke down and produced ulcers which spread peripherally. There frequently is exacerbation and remission and the condition is almost invariably associated with an ulcerative colitis."

Do you agree or disagree with that statement?

[fol. 374] A. I do not agree with the entire statement. I think there should be some modifications to that statement.

Q. Doctor, I ask you about a book entitled "Dermatology," by Pillsbury, Shelley, and Kligman, and ask you if you agree with this statement, Page 490:

"It is helpful from a didactic standpoint to consider in a group all ulcers, whether primary or secondary in which

bacteria have etiologic significance. In fact, bacteria are the primary etiologic agents of only a few ulcerative conditions. Any ulcer, of course, may become secondarily infected with bacteria, and most of these will be of the non-descript type not requiring any further discussion here."

Do you agree with that?

A. Will you re-read that first sentence, please?

Q. The very first part?

A. Yes, sir.

Q. "It is helpful from a didactic standpoint to consider in a group all ulcers, whether primary or secondary, in which bacteria have etiologic significance."

A. All right.

Q. Do you want the rest of it?

A. Yes, please.

Q. "In fact, bacteria are the primary etiologic agents of only a few ulcerative conditions. Any ulcer, of course, may become secondarily infected with bacteria, and most of these [fol. 375] will be of the non-descript type not requiring any further discussion here."

A. Yes, I will agree with that statement.

Q. And by the phrase "secondarily infected"—well, I will read from the beginning of the sentence: "Any ulcer, of course, may become secondarily infected with bacteria," does that mean, Doctor, that I have an ulcer on the surface of my skin somewhere—and by the way, an ulcer is an open sore, is it not?

A. An open sore, yes.

Q. All right. I have an open sore someplace on the surface of my skin; and by the words "secondarily infected," does that mean that bacteria may get into that open sore after it becomes an open sore?

A. We are assuming that that ulcer was not caused by a bacteria to start out with.

Q. Not at the beginning, that's right.

A. And that the ulcer may become secondarily infected by other organisms?

Q. Yes.

A. Yes, I will agree to that.

Q. So that if I should then come under your care with that

open sore on my skin, some time after it has become an open sore, you make a smear of it and find bacteria in that, those bacteria could have gotten there after the open sore was [fol. 376] already there, is that correct?

Mr. Dudnik: There is an objection to the statement "could." We are dealing with probabilities and not possibilities, your Honor.

Therefore there is an objection to that question.

The Court: Well, this is cross-examination. I am going to permit it.

A. Will you state it over again, please?

Q. All right. I come under your care with an already existing open sore somewhere on my skin; you take a smear from that, make a culture, and find a certain type of bacteria. Is it possible that those bacteria that you find at that time could have come into that open sore after it became an open sore?

Mr. Dudnik: Objection.

The Court: Are you stating a hypothetical question?

Mr. Leasure: I am using this as a purpose of illustration, your Honor, of secondary infection. I am asking in effect whether that is what secondary infection is.

Mr. Dudnik: I object to the word "possible."

Mr. Leasure: It is in the nature of an illustration.

[fol. 377] The Court: He may answer.

A. It is possible, yes.

Q. Going on in this same work here that I just referred to—

Mr. Dudnik: Is that Montgomery?

Mr. Leasure: No. This is still—this is Pillsbury.

Q. Page 493, and I will ask you if you agree with this statement under the heading of Burrowing of Academic Ulcers:

"Dermatologists are familiar with the same disease under the term of Pyoderma-gangrenosum, which has come to be

regarded as a complication peculiar to ulcerative colitis, although other underlying wasting diseases such as empyema may provide the systemic background. In the latter instance, the course of the ulcer tends to fluctuate with the gravity of the primary condition, improvement being noted when the ulcerative colitis, for instance, is in a subsiding stage."

Do you agree with that?

A. I don't agree in its entirety, no, sir.

Q. Then to continue at Page 494 of the some book, do you agree with this statement:

"The treatment of such extensive ulcers requires a vigorous attack on the primary underlying condition. It has been noted repeatedly in the case of ulcerative colitis that healing occurs when the colitis subsides, but recurrence in- [fol. 378] duces relapse of the cutaneous ulcer. The state of the ulcer is a measure of the general health of the patient, providing an index to the degree of resistance. In certain instances there may be a specific biochemical defect that is responsible for the vulnerability of the skin to infection," and then a word as long as my arm, "Hypogammaglobulinemia."

Do you agree with that statement?

A. Mr. Leasure, are you trying to tell me that this case that we have in front of us is a case of ulcerative colitis and that is why this man has a pyoderma-gangrenosa? Just for me to say yes or no on such statements that you are reading?

Q. You have asked me a question.

A. Yes, sir.

Q. I am asking you the question simply of whether or not you agree with the statement contained in the book, the statement that I have just read?

A. Well, I do know that certain cases of ulcerative colitis may get certain skin manifestations, but I still don't agree with the sentences that you have told me one hundred percent.

Q. That's all I want to know.

A. It is hard for me to answer yes or no to certain of these questions. That I absolutely can't do.

Q. I think you have answered the question. You say you [fol. 379] don't agree entirely, all right. By the way, in addition to the words "ulcerative colitis" in the previous quotation, we used the word for another condition known as empyema. Do you recognize that?

A. Empyema?

Q. Yes.

A. Yes, sir.

Q. What is that condition?

A. Empyema usually follows a pneumonia. Years ago before the advent of anti-biotics we used to see a lot of cases of empyema, in which a patient would get pneumonia and would get an infection of his pleura cavity and that would cause an empyema; or you may get an empyema of a gall bladder in which the gall bladder becomes acutely inflammed and has nothing but pus in it. That is an empyema of the gall bladder. It is a local collection of pus.

Q. It is an infection, then, within the chest cage?

A. Chest cage or abdominal cage. Cavities, as I said, empyema of the gall bladder, it depends on what organ you are speaking of.

Q. And then a book entitled "Essentials of Dermatology," by Norman Tobias. Page 146. I want to ask you if you agree with this statement under the heading Pyoderma-gangrenosum:

"The condition often is associated with empyema, dysen- [fol. 380] tery, and chronic ulcerative colitis, some cases of which are caused by a strain of streptococcus. There is evidence available that suggests that the lesions of pyoderma-gangrenosum are embolic or produced by an Arthus Phenomenon. Avitaminosis A is often present as a predisposing factor.

Do you agree with that?

A. I agree with that, yes.

Mr. Dudnik: What book, what page?

Mr. Leasure: The red one here, Page 146.

Mr. Dudnik: Red book, 146.

Q. An avitaminosis is what, Doctor?

A. An avitaminosis is a deficiency of one of the multiple vitamins that are necessary for the human body.

Q. Now, certain X-rays of Mr. Gallick's chest were taken at Marymount Hospital, were they not?

A. During the times he was there, yes, yes.

Q. Can you turn to your hospital notes and give me some information about those? Will you look at the chest X-ray reports taken some time in September of 1954, shortly after his admission?

A. I don't see a chest report on his first admission, although I know they were taken. Oh, wait a minute, I have it.

[fol. 381] Q. All right, fine. Will you tell us what that chest X-ray—first, give us the date of it, if you will, please?

A. 10-22-54.

Q. Well, I have a note of September but perhaps—may I just look at that and see if it is the same one I have in mind? There is one before that.

A. I doubt whether there was one before this. I think it was at the next hospital admission and not the first one.

Q. Well, I don't have time now to look through there.

A. Do you want me to read this?

Q. No, that isn't the one I have in mind.

The Court: Are these records from Marymount now?

A. Yes, sir.

Q. Will you turn to the first X-ray reports you have, and whatever the date of it is—

A. 10-22-54.

Q. Which showed some nodules or growths of some kind?

A. I haven't seen it but I am positive it was the second hospital admission and not the first.

Q. Well, will you find it, whatever it is?

A. There are quite a few here.

Q. Perhaps I can help you out. Do you find one for August 4th of '55?

A. There is one for 7-18-55. That was the second hospital [fol. 382] admission.

Q. May I look at that and see if that is the one I have in mind?

A. I don't see any others for the first hospital admission, except the one that I showed you.

Q. Will you turn to this one for August 3rd, 1955, and tell us what the conclusion was on that X-ray, Doctor, that appears in writing there?

The Court: What is the date of this X-ray?

A. 8-3-55. This is the conclusion: "Cavitating lesion of the peripheral portion of the right lower lobe which probably represents a carcinoma of the peripheral type. Encapsulated abscess shall also be considered in the differential diagnoses."

Q. What is a carcinoma, Doctor?

A. Carcinoma is cancer.

Q. Now, was that X-ray of the lungs of Mr. Gallick?

A. Yes, sir.

Q. Both lungs?

A. Yes, sir.

Q. And the reading relates to the right lung?

A. Yes, sir.

Q. All right. What is encapsulated abscess?

A. Encapsulated abscess means a localized abscess that [fol. 383] has a surrounding around, of the shell type, around it.

Q. An abscess contains what?

A. Pus.

Q. Indicating an infection of some kind there at that location?

A. Yes, sir.

Q. Now, will you turn to the X-ray report for September 29, 1955, and read what the finding was on that?

A. September is the ninth—

Q. September 29 I believe it is.

A. This is September 26th.

Q. Perhaps it is the 26th. Yes, that is the one. Will you read the conclusion on that?

A. Conclusion: "No significant change in the nodule of the right lower lobe since the last examination. Additional solitary well defined nodule in the middle third of the right lung. Possibility of a metastic tumor should be considered along with small focal abscesses."

Q. Doctor, leaving that subject and going to something else now, did I understand your testimony this morning that Mr. Gallick came to you about September 16, 1954, with an open sore on the back of his leg, is that correct?

A. Yes, sir.

Q. That is the only open sore he had on his body at that time, is that correct?

[fol. 384] A. Yes, sir.

Q. —that you found, all right. Now, shortly following that, however, did he develop following his admission to the hospital, I think it was late in September of that year, did he develop a redness and swelling someplace in the area of his left armpit?

A. Neck and chest.

Q. Well, let's take them one at a time.

A. All right.

Q. How about under the left arm?

A. I believe so. I haven't looked up his record completely.

Q. And did you prescribe that heat should be applied to that?

A. At the time I believe I did. Without looking at the notes I can't be positive.

Q. Did that then ultimately sometime in October break down into an open sore?

A. I am almost sure it did, yes, sir.

Q. Now, he came to you with a history, in other words, he told you, Mr. Gallick did, when he came to you that he had been bitten by an insect on the back of the leg?

A. Yes, sir.

Q. Did he ever give you any history of having been bitten by an insect or anything else near the left armpit?

A. No, sir.

[fol. 385] Q. Then what was the next open sore that developed on some other part of his body following this one at the left armpit?

A. I would have to look at some of my notes and chart. I don't quite remember.

Q. Well, did others shortly follow?

A. Yes, others followed, yes, sir.

Q. Did he ever give you any history of having been bitten by an insect or anything else at any other place on his body where another sore developed?

A. No, sir.

Q. Now, do I understand, Doctor, that you did take blood cultures from Mr. Gallick after he got in the hospital, is that correct?

A. Yes, sir.

Q. Did you take at least several?

A. Yes, sir.

Q. Over a period of time?

A. Yes, sir.

Q. Were those all negative?

A. They were normal.

Q. By that they showed no infection in the blood stream?

A. That's right.

Q. When did you take the first smear from anyone of those open sores?

A. I am sure very shortly after he came in the hospital. [fol. 386] I will have to look it up. I don't remember the exact date.

Q. Well, did you take the first one from the area on the back of his leg?

A. Yes, sir.

Q. And can you tell us what if anything showed up in that culture?

A. Well, the smear, the culture, the smear and also the culture from the back of the large ulcer he had behind his left leg showed multiple organisms.

Q. You have a report on it there, don't you, Doctor, just turn to that and tell us exactly what it was?

A. 9-20-54.

Q. Don't you have one for September 18th there, Doctor?

A. 9-20.

Q. Is that the first one you find?

A. Yes, sir.

Mr. Dudnik: September 20th?

A. Yes, sir. Two days after he came in.

Q. What organism showed up in that culture?

A. Well it showed—escherichia was one of them, and pseudomonas type another.

Q. Did it show any staphylococcus?

A. No, I don't read any staphylococcus or strep here on this report.

Q. In other words, the culture of September 20, 1954, did [fol. 387] not show any staphylococcus, is that correct?

A. Not that I can see here.

Q. Well, you have the bacteriology report right there in front of you.

A. The writing is pretty terrible, but I don't see it.

Q. I couldn't pick out any either, but you are more familiar—

A. I don't see any staph or strep on these.

Q. Now, this escherichia that you mentioned, is that escherichia?

A. Yes.

Q. And is that a type of bacteria?

A. Yes.

Q. Is it one that ordinarily is rather easily killed by medication?

A. No, I don't think so.

Q. Well, is it grand positive or grand negative?

A. It is grand positive.

Q. It is?

A. As far as I know.

Q. Isn't it a fact it is grand negative?

A. It may be.

Q. Grand negative ordinarily is more easily killed than others, are they not?

A. No, you can't say that.

[fol. 388] Q. What medication did you prescribe for that, if any?

A. May I look on this chart?

Q. Yes.

A. Of course, one of the old fashioned remedies, of course, is hot packs to start out with, heat, besides other drugs. We ordered some erythromycin, which is one of the family of anti-biotics. And we ordered local some varidase packs to the ulcer.

Q. When was the date of your next smear and culture?

A. 10—I have here—10-30.

Q. 10-30, was that?

A. No, this was a stool culture. I don't have another culture here that I know we took from the ulcer per se.

Q. Do you have any cultures that you took from any of the other ulcers during his first admission?

A. No, that was the only one, and a stool culture.

Q. This escherichia is something that is found in quite a few different places, isn't it, Doctor?

A. Yes.

Q. It is found in the soil?

A. It can be.

Q. It is found on the surface of the human body?

A. Not to my knowledge on the surface of the human body. Some places in the human body, but not on the surface, let's say. It is found in stools, and so forth. So it can [fol. 389] be found on human bodies.

Q. It is naturally inside of our bodies, isn't it, in our digestive tract and intestinal tract?

A. It can be found in some, yes.

Q. There was nothing in your medical studies which showed to you just when this escherichia, that bacteria, got into this ulcer, was there?

A. No.

Q. It could have gotten in there the day before the smear was made, the week before, any other time, is that correct?

A. I don't know, to be truthful with you.

Q. You just don't know?

A. That's right.

Q. Will you turn to your notes for October 26, 1954.

A. You mean our daily sheets, do you mean the yellow sheets?

Q. I think you have doctors notes and entries there, don't you?

A. Yes, sir, October 26th?

Q. Yes.

A. Yes, sir.

Q. Is there a notation entered there that suggests pyoderma gangrenosa that may be due to a systemic infection?

A. There is a note down here that is an impression of one of the doctors that came in to see him.

Q. Will you read what that is?

[fol. 390] A. Well, seen in consultation by Doctor Kauf-

man. Doctor Kaufman is the pathologist at the time, he was the pathologist who had a part-time job at Marymount, but his main department was over at City Hospital.

Do you want me to read the whole thing?

Q. Yes, if you will, please.

A. The writing is a little hard to read. He has down here Doctor Moss, who is an intern. Fungus suspected. Infected, systemic infection. Then he has down after that, Weber Christian disease of panniculus. Panniculus means the fatty tissues that we have. Suggested by Doctor Ippolito.

Dermatologic textbooks describe type Pyoderma-gangrenosa. Then he has down here, due to systemic infection, by yeast or amoebae, and toxins identical to this case, bloody dysentery, evidence of systemic involvement.

Asthenia means thinness of the person. Stool specimen negative for amoebae. Positive for blood. Repeat specimens and slides for yeast and other pathogens, and bar enema, and patient to have biopsy of newest lesion in arm. M. Moss.

Q. Now, did I understand you to say in your direct testimony that on or around November 23, 1954, you described his condition as having several lesions of the skin, that is, ulcers of the skin, specific etiology unknown?

A. Specific etiology unknown, yes.

Q. Etiology means what, Doctor?

[fol. 391] A. Etiology means the specific cause of a condition. May I further explain what I am talking about?

Q. Well, let me ask you another question which may help get a specific definition.

Do you mind if I read from two medical dictionaries? First is American Illustrated Medical Dictionary, by Doreland, under the word "etiology"—"the study or theory of the causation of any disease; the sum of knowledge regarding causes."

And from Blakiston's New Gould Medical Dictionary, second edition, the word etiology, "the science or study of the causes of disease, both direct and predisposing and the mode of their operation."

Do you agree with those definitions of the word etiology?

A. Yes, to a certain degree, yes.

Q. To what degree?

A. To make it a little more illustrative, may I use this case as an illustration?

Q. No.

A. Or should I take another case?

Q. I just want your definition of the word etiology.

Mr. Dudnik: I think the Doctor may—

The Court: The Doctor has already given that definition. [fol. 392] Mr. Leasure: All right, I will pass that.

Q. Now, going to the second hospital confinement, Doctor, starting in January of 1955, did you make a culture on February 9, 1955?

A. What was that date again, Mr. Leasure?

Q. February 9th, '55.

A. Yes, sir.

Q. Did you find, or was there found any escherichia bacteria at that time?

A. No, not at this time, no, sir.

Q. So that bacteria apparently had cleared up, then, is that right?

A. Yes, sir.

Q. Can you tell from these reports which of the ulcers the smear was taken from, from which ulcer?

A. This is from the back, this smear.

Q. What do you mean the back?

A. The back of his body.

Q. I wasn't aware that he had an ulcer on his back at that time; did he?

A. I don't remember, but you asked me where it was taken, the smear here, and it says "back."

Q. Well, upon his admission the second time—and will you turn to your history and physical examination—does [fol. 393] that show a diagram where he then had open sores?

A. Yes, sir.

Q. And what does that diagram show?

A. It shows that he had ulcers in different parts of the body here.

Q. It shows one under the left arm?

A. Yes, sir. Left popliteal region, that is where he originally had it. Left Achilles tendon, that is behind the heel back here.

Q. And one on the right leg?

A. And one on the right knee, yes, sir.

Q. What did this smear—does it show any on the back? That is what confuses me a little bit.

A. He probably meant back of the knee, I imagine, rather than the back or upper part of the body.

Q. What did that smear show on February 9th, 1955?

A. Few candida albicans overgrown with Proteus species or organisms.

Q. That smear shows things entirely different than the smear taken back in September, is that correct?

A. Yes, it would.

Q. Well, it does, doesn't it?

A. Yes, yes.

Q. It doesn't show the same bacteria found back in September; it shows new or different organisms?

[fol. 394] A. Yes.

Q. What are candida albicans?

A. Well, as far as I know, they are yeast type of organism.

Q. All right. Overgrown with Proteus species, what are those?

A. Proteus is a green type of bacteria. When you have an infection of it, it has sort of a greenish pusy growth.

Q. Is this yeast-like thing something that can come through the air, this candida albicans, if you know?

A. Not so much the air as contamination.

Q. On the surface?

A. It is possible.

Q. Anything else you might touch?

A. It is possible.

Q. Now, Doctor, I could take a lot more time on these hospital records, but I am not going to, in the interest of saving time.

Let's get back, Doctor, to this hypothetical question that you were asked this morning.

Do you recall that to mind now?

A. The general part of it, the part that I have to know, yes.

Q. The part that is important to you?

A. Yes, sir. I think it is important to the case.

Q. Will you then tell us exactly why you say in response

[fol. 395] to that hypothetical question that there was a causal relationship between the conditions and the bite set out in the question, and Mr. Gallick's condition?

A. I answered that yes to Mr. Dudnik's question this morning because as he put it in his hypothetical case, he wanted me to assume that here was a normal individual who had worked for four straight years on a tough job, who had only been to a doctor once in his lifetime for something incidental. He never lost any time.

He had no history of any systemic infections, because he hadn't been to a doctor in four years, and I had to assume that.

This man was working near a rat-infested pool, with dead rodents in it, and bugs flying in the air. The man was bitten by an insect, and the conditions that followed thereafter. I don't know how I could assume anything else, that the causative agent was this insect bite.

Now, what etiological agent, what bacteria this bug was carrying, I have never proven, and to me I believe it is only incidental.

I know from the history that this man was bitten by a bug, and this bug was in the area of a rat-infested stagnant pool. And I have to assume that, as a Doctor, that is my professional opinion, yes.

Q. Are you finished? Fine. I take it, then, that what you [fol. 396] are telling us is that in view of the assumed facts that you have just pointed out—

A. Yes, sir.

Q. —and you don't know whether it is right or not about the man's history and perfect condition of health—in view of those, you hear these facts given you by Mr. Dudnik, and since you have not found any medical reason that would exclude the possibility of a bug bite causing this, you then assume that that is the cause, is that about it?

A. Yes.

Q. Now, along that line, Doctor, you are assuming, too, are you not, that some bacteria were introduced into this man's body at the time of the bite?

A. Yes.

Q. As distinguished from bacteria getting into a pimple or sore later on through any mechanical means, is that correct?

A. What do you mean by later on by mechanical means? I don't understand that.

Q. By scratching it or rubbing it, knocking the head of it off, and at that time the bacteria getting in?

A. To me that question at the time and after was not important, to me.

Q. You don't know either way medically, do you?

Mr. Dudnik: No, that isn't what he said, your Honor. Objection.

[fol. 397] A. To me.

Mr. Leasure: I am asking him.

Q. You don't know either way medically whether the bacteria got in there at the time of the bite or later on?

A. I have to assume, then, if I have to be pinned down to one answer.

Q. You are assuming that, then?

A. I believe it. I am not assuming it, that the bacteria, that this infected insect was carrying around at the time, at the time that Mr. Gallick was infected, that it was injected in him at that time.

Q. You are assuming, are you not, Doctor, that the insect itself was infected first, you are assuming that?

A. I believe it.

Q. Well, how do you know?

A. Because of the course of the events, from the time from what you have told me yourself.

Q. Don't take anything—

A. And from what Mr. Gallick has said.

Q. Don't take anything—

Mr. Dudnik: Let him finish, please. Your Honor, I ask that the doctor be permitted to answer the question.

Mr. Leasure: He is saying he assumed, from something I told him. I did not tell him anything.

[fol. 398] A. All right, you did not tell me. Will you rephrase your question, please, Mr. Leasure?

Q. All right. Medically, Doctor, don't we have these three possibilities? Assuming that an infection got into this portion of Mr. Gallick's leg at any time—

A. Yes, sir.

Q. We have the possibility if he was bitten by an insect, let's assume that he was bitten by an insect; we have the possibility, do we not, that the insect itself was infected.

Secondly, we have the possibility that the insect itself was not infected but that the bacteria was on the surface of Mr. Gallick's skin, and got in there from that source at the time of the bite.

We have the third possibility, do we not, that the bite produced a red nodule which was then mechanically disturbed by scratching or rubbing and the bacteria got in at that time.

Aren't those the three possibilities?

A. I don't think—I don't think they are a possibility.

Q. All right, let's go—let me ask you this question, then: You are giving us the answer that you did when of course you do not know what kind of an insect it was, if any, is that correct?

Q. I can't say that. I believe that. I believe that he was bitten by an insect, and that these things occurred [fol. 399] thereafter.

Q. I know you believe that, Doctor. But I am trying to find out—

A. In my professional judgment I believe it.

Q. All right, that is your conclusion.

A. Right.

Q. Now, I am trying to find out what facts you are basing that on, or what assumptions you are basing that on?

A. In any case, in any patient, regardless of this patient, you have to take into consideration—

Q. Let me ask you a question, Doctor.

Mr. Dudnik: Just a moment.

Q. And we will get along a lot faster.

The Court: Just a minute.

Mr. Dudnik: No, your Honor.

The Court: Just a minute, I will conduct this now. I think the question was asked and you haven't permitted the Doctor to answer the question.

Mr. Leasure: Read my question.

(Last question read by the reporter.)

Mr. Leasure: That is not a question, your Honor.

Mr. Dudnik: It certainly is a question.

[fol. 400] The Court: I will determine whether it is a question. The statement there is what assumptions.

Mr. Leasure: Well, I will withdraw it and ask a question. It wasn't a question. It was a statement. I will withdraw it and ask a question.

The Court: Very well.

Q. Doctor, in the hypothetical question given to you by Mr. Dudnik, there was no identity of the kind of insect, was there?

A. No, not the identity of it.

Q. As to type or species?

A. Right.

Q. You don't know medically, do you, what kind or type of insect may have bitten Mr. Gallick?

A. Not what type or what species or what family, no, sir.

Q. You don't know where any such insect might have lived, do you, or its habits?

A. Whatever insect—

Q. Just answer my question.

Mr. Dudnik: Just a moment.

A. I can't answer it then.

The Court: You answer the question to the best of your ability, Doctor.

[fol. 401] A. Will you rephrase that again?

Mr. Dudnik: No, answer it to the best of your ability, Doctor.

The Court: Will the reporter read the question and then you answer it to the best of your ability.

(Last question read by the reporter.)

A. I do know.

Q. Where do you get those facts from?

A. I get it from the history of the patient. The patient told me that he was bitten by an organism, by an insect, and we do know that stagnant pools of water, particularly that are infected and have rodents, rats, in them, that insects will go to that area more so than in a dry clean area.

Therefore, I believe that this insect was living in that region where Mr. Gallick was working at the time, although I do not know what type of insect it was.

Q. Then can we agree that whatever conclusion you are expressing on that subject is based upon the statement that you have just made, that was intended to be a complete statement, was it, Doctor?

A. Yes.

Q. You did tell us this morning, did you not, Doctor, that you are not an expert on insect life, and frankly don't know anything about it?

[fol. 402] A. No, I am not.

Q. You don't know anything more about it than any of the rest of us?

A. I don't think so.

Q. So you don't know what types or kinds of insects may be attracted by one condition, as contrasted to another, is that correct?

A. I do know that stagnant pools, infected pools, will attract insects, yes.

Q. What kind, Doctor, what kind?

A. Any type of insects, even flies like to be in infected areas.

Q. Flies, yes.

A. And mosquitoes.

Q. Mosquitoes, what else?

A. Yes.

Q. What else?

A. Any type of a bug.

Q. Just any type at all?

A. That's right.

Q. That is your opinion?

A. Yes, sir.

Q. You do not know, do you, Doctor, where this insect had been, where it was going to, or how long it had been there, is that correct?

[fol. 403] A. Do you mean where it came from, Mr. Leasure?

Q. Yes, where it had been five minutes, ten minutes, fifteen minutes before?

A. I believe that it was in the area in which Mr. Gallick was working.

Q. What facts if any do you have which make you believe that?

A. My medical opinion. Why should I think that this poor insect came from ten miles down rather than coming from an infected cesspool of water?

Q. That depends, doesn't it, Doctor, on the habits of that particular insect?

A. Insects don't fly too fast. I don't know how fast they fly, but I would believe that it is more likely that that infected insect was in that close vicinity where Mr. Gallick was working and with the conditions that were there, rather than I should believe that it came from a mile or two or three miles down the track and just came there and bit him. I have to, I have to take the history that the patient gives me.

Q. You are going back to the patient's history, then?

A. The history I have to believe in any case, and the conditions at the time.

Q. But without having any precise or detail or scientific knowledge as to the habits and life of insects of the various species or kinds, is that correct, Doctor?

[fol. 404] A. I have no scientific—I am not an authority on that, no.

Q. And except for what Mr. Gallick told you, and what Mr. Dudnik assumed in his question, you have no way of knowing what it was that Mr. Gallick felt in his trousers following this bite as he described it, is that correct?

A. I have the history. I have the locality he was working. I have the condition as I found it on the first time, and the condition as it progressed to the condition he is in today. That is what I base my diagnosis and history on.

Q. You say you have the history and the facts that were given you where in the hypothetical question, plus your medical knowledge which started on September 16, 1954?

A. Yes, sir, '54.

Q. I am trying in these questions to distinguish between facts that you have been given either by the patient or the attorney here to assume, and what facts you have independent knowledge of, Doctor, do I make myself clear on that?

A. Well, may I say something, Mr. Leasure?

Q. Well, you can answer my question. Are we clear on

the distinction between assumed facts or related facts, and the facts that you have personal knowledge of?

A. Yes, sir.

Q. When this man came to you on September 16, 1954, you observed an open sore on the back of his leg?

[fol. 405] A. Yes, sir.

Q. And except for the history that the man gave you, there was no way for you to tell medically, was there, what had initiated or started that open sore?

A. The history in any case—

Q. No. I am asking you, I say except for the history that was related, you couldn't tell—

A. From the history and what followed thereafter, yes.

Q. But you had to have the history in order to reach any conclusion?

A. Oh, yes, absolutely, yes.

Q. Except for that you could have reached no conclusion medically from your examination?

A. At the time in my office you are speaking of or at the end of the time—

Q. September 16, 1954, when you first saw him?

A. Yes, sir.

Q. In other words, except for what he told you, that place on the back of his leg looked like any other open sore that you might see on another patient?

A. Not any open sore. It was tremendous.

Q. Well, except as to size?

A. Yes.

Q. But as far as the other appearance was concerned, it looked like an open sore from any cause?

[fol. 406] A. Yes, sir.

Q. And I might get an open sore if I fall down and skin my knee and knock some of the skin away, and don't take very good care of it and it starts to get a little pusy, would that be an open sore?

A. Yes, sir.

Q. Now, etiologically, Doctor, and medically, can you state specifically why this first ulcer, first sore, failed to heal upon treatment?

A. As I mentioned before, it is my professional opinion that Mr. Gallick developed this tremendous ulcer in the back

of his left leg because of an insect bite that he received while he was working. To me that is the actual cause. Now, the exact etiology, what organism was this insect carrying, and injected into Mr. Gallick, we have never found.

It may be because of our shortcomings as doctors that we do not have the facilities for isolating this particular organism. That does occur in medicine.

Q. Doctor, are you finished?

A. Yes.

Q. If you haven't isolated an organism, how do you know that it is an organism?

A. Because of the history, the way this is followed. When he went in the hospital, we ruled out diabetes, we ruled out syphilis, we ruled out cancer, we ruled out nutritional [fol. 407] diseases. We ruled out ulcerative colitis. And there has been a progression toward the worse.

You say did he have ulcerative lesions while he was in the hospital? Yes, he did, from his left leg to his right axilla, to his neck, to his other leg.

Because I have a shortcoming or maybe other doctors have a shortcoming of not being able to isolate an organism that he may still have at this time, does not mean that I can't say that there is not an organism still in this man's body that was put in there by the insect.

Q. All right. You—

A. We have to try—

Q. Go ahead.

A. — in medicine, the normal findings we have against the abnormal or positive findings we have. That's the way we make a diagnosis. No, we haven't found that particular organism as yet.

Q. You say that you cannot say that there is not an organism there. I am trying to find out how you can say medically that there is one if you haven't found it?

A. Because of the progress of this thing. What is making this lesion that started with the left leg, going over to the neck, or to the right axilla, the right armpit, and the other leg, and this man started in 1954. This man was brought here that I saw yesterday, still has an ulcer in his [fol. 408] right arm, which I believe in the future will have

to come off. That's why I believe that this man still has an organism going on.

Q. Do you know medically why and exactly how these other ulcers developed on the other parts of his body?

A. Yes, I think he gets organisms that go to these other different parts of his body and set up this same type of a reaction, as we are seeing. This—

Q. Go ahead. I don't want to interrupt you.

A. How do they get there?

Q. Yes.

A. Usually they get there through the blood stream.

Q. Have you found any organisms in the blood stream here?

A. I said that before, just because we have not been able to pick up an organism from his blood stream or culture, that does not mean that he doesn't have one there at the present time.

Q. That's what you are basing your testimony on?

A. Not only that. We know in medicine that other diseases that we haven't been able to find for years and years and years, eventually scientists have found; although we knew years ago the types of skin lesions that people would use to get years ago, tuberculous lesions, leprosy lesions, poliomyelitis, for years no one could isolate the organism. Then scientists did isolate them. That's why I can't categ- [fol. 409] gorically say this man does not have an organism and infection in his blood stream. I cannot say that.

Q. Doctor, not all bodily diseases come from organisms, do they?

A. It depends on what type of bodily diseases you are speaking of.

Q. Exactly. Some are caused by organism, some are caused by something else?

A. Like what, though?

Q. Well, let's take diabetes, that is not caused by an organism, is it?

A. But diabetes and some of your other diseases have all been ruled out, to the best of my knowledge.

Q. Well, all organisms have been ruled out to the best of your ability and knowledge, too, haven't they?

A. To a certain degree.

Q. Can we agree that undoubtedly there are bodily diseases that medical science—and I don't mean by organisms—I mean the other kind that medical science hasn't yet discovered, and knows little if anything about?

A. Nothing like this man has ever been written up in medical literature.

Q. Have you ever had another case like Mr. Gallick in your practice?

A. No, sir. I hope I never get another one.

[fol. 410] Q. I do, too.

Mr. Leasure: That is all, Doctor.

The Court: Any questions, Mr. Dudnik?

Mr. Dudnik: Your Honor, I may have only three of four.

The Court: Proceed.

Mr. Dudnik: If you feel in the middle you want to call a recess, if I go longer—

The Court: I heard the doctor express a desire to be somewhere at 3:30?

The Witness: Yes, not me, my patients.

Mr. Dudnik: I only have a couple of questions.

Redirect examination of Dr. Victor Ippolito.

By Mr. Dudnik:

Q. Let me have the second hospital admission, please. Doctor, I ask you to read the provisional diagnosis on the first sheet of the second hospital admission?

A. Second hospital admission was January 4th, 1955, and my provisional diagnosis or entering diagnosis of the patient to the hospital is pyoderma-gangrenosa, secondary to insect bite.

Q. What is the meaning of provisional diagnosis?

A. It is the impression that we have of a case as they are admitted to the hospital, and sometimes we may admit [fol. 411] a patient with what I will say is an ulcer of the stomach, but we ventually find out that this patient has cancer of the stomach and not just an ordinary ulcer. That is what I mean by provisional diagnosis.

Q. Doctor, following that provisional diagnosis, you observed him for some 14 or 15 months, did you not?

A. That's right.

Q. You made your tests and studies and did everything else by way of treatment?

A. Yes, sir.

Q. Was your final diagnosis—

A. Final diagnosis—

Q. —any different than the provisional diagnosis?

A. Absolutely not. Exactly the same.

Q. Doctor, did you rule out cancer of the lung?

A. Yes, sir.

Q. Did you rule out all cancer?

A. Yes, sir.

Q. Doctor, how many times did you see this man?

A. Well, I saw him every day for all the time he was in the hospital, except for once or twice I took a short vacation or when I was with the Cleveland Browns, and then other doctors that I left saw him. I don't think there is any question I saw him between 550 and 600 times, or more. [fol. 412] Q. Doctor, do you know Doctor Hammond, Carl Hammond?

A. Very well.

Q. Tell us whether or not you learned that he examined Mr. Gallick on behalf of the B & O Railroad?

A. Yes, he did. I know that.

Q. Following that examination did he consult with you?

A. He talked to me, yes, sir.

Q. Did he tell you what his opinion was after his examination—

Mr. Leasure: Finish the question.

Mr. Dudnik: Just a moment. Don't answer that because Mr. Leasure rose to object.

Mr. Leasure: Are you finished?

Mr. Dudnik: Read the question. I don't remember now whether I am finished or not.

(Question was read by the reporter.)

Mr. Leasure: I am objecting, of course.

Mr. Dudnik: I don't think he should give reasons.

Mr. Leasure: Obviously, if Dr. Hammond were physically able and not in the hospital with a heart attack, as

I understand it, we would have him down here and tell his own story.

[fol. 413] Certainly it shouldn't come from this man.

Mr. Dudnik: Mr. Leasure, will you admit Dr. Hammond's report in evidence?

Mr. Leasure: I would like to have Dr. Hammond here so he can explain all aspects of the case.

Mr. Dudnik: Will you let the jury read the letter Dr. Hammond sent you?

Mr. Leasure: Not the letter itself, no, sir.

The Court: Just a moment. There was a question asked of the witness and there was an objection to the question. The question called for a yes or no answer. The witness may answer yes or no.

He cannot testify to any conversations that were had between this witness and Dr. Hammond.

Mr. Dudnik: Will you answer that question yes or no.

A. Yes, he gave me his opinion.

Q. Did Dr. Hammond also give you his diagnosis?

A. Yes, sir.

Q. Now, one more question or two. Can you give a prognosis—withdraw that.

One more question. You have heard, you have been asked [fol. 414] many questions by me and many questions by Mr. Leasure. Do you still hold to the opinion you gave this Court and jury?

A. Yes.

Mr. Dudnik: That is all, Doctor.

The Court: Anything further, Mr. Leasure?

Mr. Leasure: Just one question in view of one of the questions by Mr. Dudnik.

Recross examination of Dr. Victor Ippolito.

By Mr. Leasure:

Q. You found abscesses on the right lung there by X-rays, is that correct?

A. Yes.

Q. Did you do anything more about that, did you do any more about that?

A. No. We had him on anti-bioties and just took X-rays to follow the course of it. We saw no point, we were positive we were not dealing with a cancer. As long as we were not dealing with cancer, and the treatment of abscesses of the lung are different today than they used to be years ago, because of anti-bioties. So we kept him on anti-bioties, hoping that that would clear up his abscesses.

Q. These were encapsulated abscesses, that is, pus pockets on the lungs?

A. That's right.

[fol. 415] Mr. Leasure: That is all.

Mr. Dudnik: Thank you very much, Doctor.

The Court: Ladies and gentlemen of the jury, there will be a brief recess.

You will return to the jury room, once more with the admonition that you do not talk to anyone about this case, not even amongst yourselves.

(Thereupon a recess was taken.)

Mr. Dudnik: Dr. Anderson, will you be sworn, please?

[fol. 416] Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness Dr. Robin Anderson, who, being first duly sworn, was examined and testified as follows:

Direct examination of Dr. Robin Anderson.

By Mr. Dudnik:

Q. Dr. Anderson, will you please give us your name in full?

A. Robin Anderson.

Q. Where do you live, sir?

A. South Euclid, Ohio.

Q. Address, please?

A. 3822 Freemont Road.

Q. Doctor, are you a licensed practicing physician and surgeon in this community?

A. I am, sir.

Q. Will you first please tell us what medical school you attended?

A. Harvard Medical School.

Q. When did you graduate from Harvard?

A. 1943.

Q. Following that did you have any other schooling?

A. No further schooling, no, sir.

Q. Following that what did you do, Doctor?

A. I had two years of surgical training at Children's Hospital in Boston.

[fol. 417] Q. Following that what did you do?

A. I spent three years in the Army as a plastic surgeon.

Q. Where in the Army did you spend that time?

A. I spent one year in the European theatre, and the remainder in the United States in the Plastic General Hospital.

Q. During that three years in the Army service, did you perform few or many plastic operations?

A. Many.

Q. Doctor, following your service what did you do?

A. I returned to surgical training at Ohio State University Hospital.

Q. And how long were you there, Doctor?

A. Two years.

Q. Following that what did you do, Doctor?

A. I went to Washington University in St. Louis for two years for plastic surgery training.

Q. Following that, Doctor, what did you do?

A. I joined the staff of the Cleveland Clinic as head of the Department of Plastic Surgery.

Q. Are you now head of the Department of Plastic Surgery at the Cleveland Clinic?

A. Yes, sir.

Q. And how long have you been head of that department, sir?

A. Just short of 8 years.

Q. Doctor, are you a member of any medical societies?

[fol. 418] A. Yes, sir.

Q. Will you tell us what they are?

A. I am a member of the local Academy of Medicine, the Cleveland Surgical Society, the Ohio State Medical Society, the American Medical Association, the American College of Surgeons, the American Society for Plastic and

Reconstructive Surgery, the American Association of Plastic Surgeons, the Plastic Surgery Research Council, and the Society of Head and Neck Surgeons.

Q. Doctor, in order to obtain membership into some of these societies, do you have to take tests?

A. No, sir.

Q. How do you get into some of these societies, Doctor?

A. You are admitted by qualifications, often in terms of having taken the American Board in the specialty, which is a qualifying examination, but separate from the societies, and by having had a period of training plus practice.

Q. And do you have to take an examination to take the American Board?

A. Yes, sir.

Q. What does that examination consist of, Doctor?

A. It is based first on adequate training. Then on the presentation of a group of previously-prepared cases, and then a 3-day examination.

Q. You took such an examination and passed it, I take it?

[fol. 419] A. Yes, sir.

Q. Doctor, have you written any papers in connection with your surgical specialty?

A. Yes, sir.

Q. And have those papers been published?

A. Yes, sir.

Q. In the medical periodical?

A. Yes, sir.

Q. Doctor, I will ask you if you had occasion to examine and treat the patient in this case, James Gallick?

A. I did, sir.

Q. Doctor, I am going to hand you all of the records of your hospital, so that you may refer to them in your testimony as you find it necessary.

Can you tell me approximately when you first saw Mr. James Gallick?

A. I can give you an accurate date, sir. July, 1956.

Q. At that time did you take a history from him?

A. I did not see Mr. Gallick on his initial entrance to the Cleveland Clinic Hospital. He was admitted on the dermatology service, and I saw him in consultation and accepted him as a transfer from that department.

Q. He was then transferred from the dermatology service to your service?

A. Yes, sir.

[fol. 420] Q. And when you first saw him did you take a history or did you not, Doctor?

A. I did.

Q. Will you briefly tell the jury what the patient told you as to how he got his original condition or sustained his original condition?

A. He stated that he had been injured approximately two years previously while working for his employer. He stated that he had been bitten by some insect which had progressed steadily to the condition in which I first saw him.

Q. Now, when you said the word injured, did you mean that in connection with the bite, or is that something else?

A. In connection with an insect bite.

Q. You call that an injury, do you, Doctor?

Mr. Leasure: I think I will object to that, your Honor.

A. Yes.

Q. Can you tell us—

Mr. Leasure: Just a moment, Mr. Dudnik. Don't try to gloss over this.

Mr. Dudnik: I am not trying to gloss over anything.

The Court: The last question and answer will go out.

Q. Doctor, what is a trauma?

[fol. 421] A. Trauma is any form of injury.

Q. After receiving the history that you did receive from the patient, can you tell us or not whether in your opinion it was traumatic in origin?

Mr. Leasure: Just a moment. I object unless the question is clarified as to whether the witness is being asked to interpret the patient's story.

If that is the question I am objecting to it because that of course would be improper.

Mr. Dudnik: The history is something that the Doctor is permitted to testify to, your Honor, and once he has had—

The Court: There is no question about the Doctor being permitted to testify to this history as given to him by the patient.

Mr. Dudnik: Once he has obtained the history I believe I have a right to ask him whether he considers whatever the man told him to be of the nature of a trauma or not. That is the reason I asked him.

The Court: He can only relate what the patient told him. I think he has already stated that he suffered an insect bite. [fol. 422] Mr. Dudnik: Is your Honor sustaining the objection to my last question?

The Court: I would like to hear the last question. Read the question.

(Last question was read by the reporter.)

The Court: He may testify whether in his opinion it was traumatic in origin.

Q. Will you answer that question, Doctor?

A. I would say yes, an insect bite is a form of trauma.

Q. Doctor, did you following or in connection with your taking a history examine the man?

A. I did, sir.

Q. Will you tell the jury, please, and the Court, what your first examination disclosed or revealed to you?

A. The patient was obviously a very ill person, in poor physical condition.

The outstanding feature of his examination was a number of areas of ulceration on his legs, open sores which were extremely dirty.

Q. And when you say dirty can you explain what that means?

A. They were dirty in that these wounds were covered with necrotic material, and what we call exudate or pus, which is the more common name.

Q. How many areas, if you can recall or can tell us, how many of such ulcerated areas were there on this body when [fol. 423] you first saw him?

A. I would prefer to check that, sir.

I would say that we were probably dealing with a matter of 4 or 5 areas, some of which ran together, but if we talk about discrete areas, it was probably that number.

Q. In which part of his body was the largest ulcerated area, Doctor?

A. On the thighs.

Q. Doctor, following your examination did you as his physician determine that something ought to be done for him medically or surgically?

A. I did, sir.

Q. And what was it that you determined should be done?

A. Well, our initial treatment of this man was to take him to the operating room and surgically clean the involved areas.

Q. And is that what you did the first time?

A. Yes.

Q. Now, will you tell us what work or what you did in the surgical cleansing of these areas, or surgical cleansing of these areas?

A. The operative procedure consisted of attempting to remove the surface, the actual surface of the ulcers in an effort to get to normal appearing tissue. In other words, tissue which looked as though it was alive.

[fol. 424] Q. Did you have to cut away then some flesh and tissue, Doctor?

A. Yes, sir.

Q. Was there much or little that you had to cut away?

A. A large amount.

Q. And was that in more than one area that you did that?

A. Yes.

Q. And of course it was necessary to put him under a general anesthetic?

A. Yes, sir.

Q. Can you tell me how long that first surgical procedure took you, Doctor?

A. Without consulting the record I—

Q. I would appreciate it if it isn't too much trouble that you consult the record. If you are going to have any difficulty, Doctor, I will skip the question, Doctor.

A. It would be difficult to find the right operative note, sir. I would guess probably an hour.

Q. Doctor, can you tell us following that surgery if Mr. Gallick was in pain?

A. He was.

Q. And was this severe, slight, or medium pain?

A. Severe.

Q. Now, after you did perform that operation, did you as his physician do anything else following that?

[fol. 425] A. Yes, sir.

Q. Will you tell us what you did following that?

A. He remained under my care for approximately two years, during which time he had a great deal of surgery carried on.

Q. Now, Doctor, without going into the complete details of what you did during the two years that he was under your care, did you at my request make a summary of the amount of operations or the number of operations that you performed?

A. I did, sir.

Q. How many plastic operations did you perform?

A. He had 26 operative procedures, of which—

Q. I am sorry, go ahead, Doctor.

Q. —of which 9 were skin grafts, and 2 were procedures done by someone else which were amputations.

Q. You have told us about 26, and you mentioned 11; what were the other 15 operative procedures?

A. The other procedures consisted of cleansing of these wounds, what we call debridement, such as I described for the initial procedure, and dressing under anesthesia because of the pain associated with carrying out these dressings.

Q. Now, the 9 plastic operations which you performed, did you have to use donor sites from his own body?

A. Yes.

Q. Where did you take the skin that you used to apply in your plastic surgery?

[fol. 426] A. Anywhere that we could get it.

Q. Well, what part of the body then did you go to, what areas did those 9 skin grafts require as donor area?

A. Uninvolved areas of leg, abdomen, back; I don't think we took any from the arms, but that's the only place we didn't.

Q. In other words, you took skin from all those parts of his body to apply to the ulcers which you were covering?

A. Yes, sir.

Q. Doctor, did any of those skin grafts take?

A. Yes.

Q. Which ones?

A. Initially a number of them took, and at various times in his course we thought we were obtaining a moderate degree of coverage, but ultimately they did not survive satisfactorily.

Q. When you say they did not survive, what do you mean, can you explain that, Doctor?

A. In the presence of debris, purulent material, pus, a skin graft is very prone to also be dissolved and eaten away as the other tissue was, and this occurred.

Q. Doctor, on each of these 9 operative procedures involving skin grafts, were they all done under general anesthetic?

[fol. 427] A. Yes, sir.

Q. Were they done on separate occasions?

A. Yes, sir.

Q. And following that can you tell us whether or not the patient was suffering pain?

A. He was.

Q. And did that pain continue from operation to operation?

A. It did.

Q. And was it of a mild, moderate, or intense nature?

A. Most of the time it was severe.

Q. Doctor, was he given medication for the relief of pain?

A. Yes.

Q. What type of medication?

A. Various narcotics.

Q. Doctor, what would be the appearance of the grafted area after the graft is on?

A. If there is no graft remaining, it becomes exactly like any of the other ulcers.

Q. Did you have to do a debridement before you did some of these grafts?

A. Every time.

Q. Was that another operative procedure, Doctor?

A. Well, that fits into the same type of operation.

Q. Can you tell us just a little bit how you take skin from one part of the body and apply it to ulcerated area?

[fol. 428] A. With this type of skin graft, which is called a split skin graft, it is a thin piece of skin which is literally shaved off with a razor blade. It happens to be a specialized razor blade, but it is just as sharp as a razor blade.

And the graft is removed with this blade, so that the full thickness of the skin is not taken. The skin is split, and this piece of skin that has been removed is then placed on the area we want it and usually stitched in place.

Q. And did you have to do stitching after each one of those grafts?

A. Yes, sir.

Q. And was there much or little stitching, Doctor?

A. Usually considerable.

Q. Is that stitching removed or does it dissolve?

A. Usually removed.

Q. Did you have to remove stitches from him on 9 different occasions?

A. I would think so, sir.

Q. Is that your best recollection?

A. Yes, sir.

Q. Was that to this man a painful procedure?

A. It usually was, yes, sir.

Q. Did you have to do some of that under anesthetic?

A. I don't remember this, sir.

Q. Now, then, going now to these other operative pro-[fol. 429] cedures for the bandaging, why would a man have to go under a general anesthetic for bandaging, Doctor?

A. Because he had such severe pain that even with narcotics we were unable to take his dressing off in bed, particularly early in his hospital stay.

Q. Then did you because of that take him to surgery and put him under a general anesthetic?

A. Yes.

Q. To do that?

A. Yes.

Q. Following that will you tell this Court and jury whether he was in severe pain?

A. He was, usually, yes.

Q. Doctor, did there come a time when further surgery was performed, and I am referring to amputation?

A. Yes.

Q. Was that done following a consultation which you had with other men?

A. Yes.

Q. Will you tell me about the first amputation?

A. Well, amputation was finally advised for his left leg when it became obvious that we were losing ground, and when in our opinion even if we had been able to cover his leg at that point, he would not have had a useful extremity. And our orthopedic consultant was asked to see him, and he [fol. 430] concurred in this finding and recommended the operation.

Q. And was that done?

A. Yes, sir.

Q. Was that sometime in May of 1957, Doctor?

A. Yes.

Q. Now, can you tell us approximately how much of a stump was left after that amputation?

A. He was left with a much shorter stump than we normally would do for what is called a mid-thigh amputation. There is no way to describe it accurately. But the amputation was done above the middle of his thigh.

Q. Following that did he require any further surgery in the stump area, Doctor?

A. He had considerable trouble with the stump, and we had a very difficult time getting satisfactorily healing.

Q. Was he in pain, Doctor?

A. Yes, sir.

Q. And was it severe, mild or moderate?

A. It was usually severe.

Q. Doctor, from the time of the first amputation which was in May of 1957, is it a fact that approximately a year elapsed before there was a second amputation?

A. Yes, sir.

Q. During that year, Doctor, were you in attendance on him?

A. Yes, sir.

[fol. 431] Q. Was he your patient?

A. Yes, sir.

Q. What was his condition during the year between the amputations, Doctor?

A. He continued to have exactly the same difficulty on the right leg, which gradually progressed.

Q. Doctor, I am going to hand you some photographs that were taken at the Cleveland Clinic, and ask you to look at them, and ask you if they correctly represent the appearance of some of those ulcers that Mr. Gallick had during the time that he was a patient at the Cleveland Clinic?

A. They do except for this last photograph which shows donor sites of skin.

Q. That is the photograph, Plaintiff's Exhibit No. 5, is it not?

A. Yes. It shows areas which have scarred from which skin has been taken.

Q. How about the other four photographs?

A. The others are photographs of the legs.

Q. Now, Doctor, I will ask you whether at any time during this stay his condition for the ulcerous condition appeared worse than they do in these pictures?

A. Yes, sir.

Q. Doctor, will you tell us whether or not you have any knowledge of Mr. Gallick having become addicted to narcotics?

[fol. 432] A. I can say only that we had a very difficult time at any period in his course of cutting down his narcotics or of getting adequate effect from the narcotics we used.

Q. I will ask you, Doctor, if during the time that he was under your care whether this ulcerous condition gave off any odor?

A. Yes.

Q. What type, can you describe them to some extent?

A. Well, I can describe them only as foul, the type of odor associated with gangrenous material, dead material.

Q. Doctor, have you seen him lately?

A. No, I have not, sir.

Q. Doctor, can you tell me whether or not he required blood transfusions during the time that he was under your care?

A. Yes, he did.

Q. Do you know how many or approximately how many blood transfusions he had?

A. Somewhere in the neighborhood of 30 to 40.

Q. Can you tell us about how much blood he was given at each transfusion?

A. Usually a single pint.

Q. And that 30 to 40 pints, was that administered over the course of the period of two years?

A. Yes, sir.

Mr. Dudnik: Your Honor, at this time I am going to ask [fol. 433] a hypothetical question, and I want to know what your Honor's wishes are about continuing?

The Court: May I see counsel?

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

The Court: Ladies and gentlemen of the jury, on the adjournment of court by the bailiff we will adjourn for the evening, and we will return at 9:15 tomorrow morning, once more with the admonition that you do not talk about this case with anyone, not even amongst yourselves.

Mr. Dudnik: May I ask, your Honor, for one thing?

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

The Court: I would just like to make it known to the jury so we don't keep them in the dark.

The doctor is going to be busy the early part of the morning, and for that reason we will start the proceedings tomorrow morning at 10:30 rather than at 9:15.

[fol. 434] I hope you all have a nice night's sleep.

(Thereupon an adjournment was taken to 10:30 o'clock, a.m., Wednesday, June 17, 1959, at which time the following proceedings were had:)

[fol. 435] Wednesday morning session,
10:30 a.m., June 17, 1959

DR. ROBIN ANDERSON resumed the witness stand and was further examined and testified as follows:

Direct examination of Dr. Robin Anderson, resumed

By Mr. Dudnik:

Q. Dr. Anderson, at the expense of boring everybody, I am going to ask you a hypothetical question which will be based on the facts in evidence, wherein I am going to ask you to assume certain things as being the facts for your question.

Doctor, I want you to assume that James Gallick, a man who in August of 1954 was 53 years of age, and had no prior diseases with the exception of chicken pox early in life. That the only other mishaps he had were three or four minor accidents before August of 1954; that he never had a skin disease, skin eruption, allergy, or any other illness of any kind.

That prior to 1954 while eating during an argument he swallowed something which caused him pain in his chest and he called on a doctor who saw him I think once and perhaps twice, from which he recovered.

Assume further that this man went to work for the B & O Railroad in 1944 as a brakeman and switchman; that all his life he had done hard manual work, the longest job before [fol. 436] that having been with the Hunkin-Conkey Construction Company in construction work.

That from 1950 to 1954 he worked very steadily on one job for the B & O Railroad, known as the Downtown No. 2 job, which consisted of switching cars in the flats of Cleveland; that in that area there was a bridge known as the Columbus Road bridge which extended in an easterly and westerly direction, under which ran a single track of two rails which extended north and south.

That for many years before August 10th of 1954 there existed underneath the bridge a swamp, which constantly contained stagnant water, in which were lying rats, dead

rats, dead pigeons, sometimes or most of the time between 20 and 30.

That in and around those dead rats and dead pigeons there crawled and flew bugs and insects of many kinds and description.

Assume further, Doctor, that farther down that river track, or to the south, there were areas where there were other dead rats and pigeons laying around, as well as farther up the bridge toward the north.

Assume further that the greatest concentration of dead rats and dead pigeons was in that water in the ditch which ran alongside one of the rails and was directly underneath the Columbus Road bridge.

[fol. 437] Assume further, Doctor, that this was called to the attention of employees of the company on occasions, that on occasions the roadmen or the trackmen had attempted to clean that area out, but without success.

That on approximately August 10, 1954, the exact date being unknown, Jim Gallick had occasion to walk underneath the Columbus Avenue bridge from a southerly to a northerly direction; that he walked on the left side or westerly side or opposite from where the ditch was which contained these vermin which I have told you about; that between him and this ditch were these two rails of single track.

That he stopped underneath the bridge for the purpose of determining where his engine was, and therefore in doing that instead of heading north as he was walking, he then turned around and headed south.

And that he was standing there for approximately 30 to 45 seconds and he saw his engine and decided to continue to proceed walking under the bridge. He had started, turned north again, made one or two steps in a northerly direction when he felt a sting or bite behind his left thigh about four inches above the knee.

That he touched, grabbed it with his hand, an object with his hand, that he squeezed it, that he heard it and felt it pop, that he did not see it but that it was about the length of three fingers and as big around as his little [fol. 438] finger.

That after he squeezed it and it popped, he felt it roll down the back of his pant leg.

Assume further, Doctor, that that sting or bite he continued to feel it. He was conscious of pain there at all times. At 7:00 that evening—this having occurred approximately at 3:30 in the afternoon—about one-half hour he started his daily tour of duty, I mean by that this accident occurred at about 3:30 in the afternoon; about 7:00 that evening or four hours later when he had his dinner, either shortly or before that, he lowered his pants in a dressing room of some kind, could not see this area where he felt the pain and where he was bitten, took some soap and water and washed it, continued however on his tour of duty until 11:00 that night.

Doctor Anderson, assume further that at 11:00 or 11:30 when he came home that night he lowered his trousers and showed his wife the area where he felt this bite, which continued shall we say to bother him or pain him, but not too greatly.

That she described it to him as a raised area, red in appearance, and I think a pink center or a white center, that it was small, that it gave neither him nor her any concern, that he washed it that night, continued to work the next day.

[fol. 439] The next morning she saw it again and it appeared slightly larger. That it gave him or her no concern, and he continued to work for some 4, 5, 6 or 7 days, washing it and treating it himself.

That about 6 or 7 days later the area then appeared the size of a half a dollar, was raised and pink, with a head on it; that while he was taking a bath this area with the head on it broke open, and then he went to see a doctor. The doctor saw this area. He does not recall or has no record of whether he took a history of how it happened or not, gave Mr. Gallick an injection of penicillin with some ointment dressing, and told him to come back in a couple of days.

That he did come back in a couple of days when the body was again injected with penicillin, further dressing of some kind, and told to come back, which he did. That he came back

on some four or five occasions, the last occasion being, Doctor, I think September 7th of 1954. At that time the Doctor examined the area and decided it was resisting treatment; that rather than improving it was getting worse, and recommended that he be hospitalized for further studies.

Assume, Doctor, that following that recommendation Mr. Gallick did not go back to the doctor, but came to see another doctor.

[fol. 440] Assume further that on the date that the doctor saw him the first time, the second doctor, he gave him a history of an insect bite. That the doctor put him in a hospital, performed the work of surgery, treatment, cultures, skin grafts and that he was in the hospital for some 3 months the first time; that he had gone home for about 3 weeks and came back and stayed some 14 or 15 months, during which time the second doctor treated him, and that many other lesions appeared on the body.

Assume further that this condition was getting progressively worse, that the lesions in his leg were so deep that the doctor could see the tendons and muscles, some of which were torn, that he had atrophy, and that the doctor—being Dr. Ippolito—sought consultation, and all the medication and treatment that was given him did not improve his condition.

Assume further, Doctor, that shortly after his discharge from the hospital the second time, when he was no longer the patient of the second doctor, he entered the Cleveland Clinic as a patient of the Cleveland Clinic and as your patient, Dr. Anderson.

That there were many operations performed by you, that there were some 8 skin grafts, that there were several surgical procedures under anesthetic in removing the bandages because the pain was so intense; that he was in the [fol. 441] Cleveland Clinic Hospital for some two years.

Assume further, Doctor, that after these many operations which you performed, in May of 1957 one of his legs was amputated with a short stump, and approximately a year later the second leg was amputated.

Assume further, Doctor, that in July of 1958 he went directly from the Cleveland Clinic to Highland View Hos-

pital, where he has been a patient ever since, and still is a patient today.

Assume further, Doctor, that upon examination by Dr. Ippolito he found an area on his right arm which was necrotic, which looked like some of the areas of infection that he had while he was Dr. Ippolito's patient.

Assume further, Doctor, that he is in a hospital now.

Now, Doctor, assume further that it is the opinion of Dr. Ippolito that the right arm will have to be amputated.

Taking everything that I have given you, Dr. Anderson, in this hypothetical question to be a fact, based on your treatment and observation of this man, do you have an opinion based on reasonable medical certainty as to whether or not there is a direct or proximate causal relationship between the ditch containing the stagnant water, the dead rats, the dead pigeons, the insects flying around it, the bite or sting which he sustained on that day in that area, and his present condition as you have heard in this hypo- [fol. 442] thetical question; and will you answer that question yes I have an opinion, or no I have no opinion?

A. Yes; I have an opinion.

Q. Doctor, will you state your opinion?

Mr. Leasure: Objection.

The Court: Objection overruled. He may answer.

A. My opinion is that there is a direct relationship between the state of the man's health, the insect bite, and the stagnant area.

Q. Doctor, have you an opinion based on the last time that you saw him as to whether or not he required hospital care?

A. He did require hospital care.

Q. Have you an opinion based on the last time you saw him as to whether or not he required nursing care around the clock?

A. He did.

Mr. Dudnik: You may cross-examine.

Cross-Examination of Dr. Robin Anderson

By Mr. Leasure:

Q. Dr. Anderson, as I understand it, Mr. Gallick was under your care for over approximately what period of time?

A. Two years.

Q. About two years, up to July of last year, 1958, was it?

A. Approximately that.

[fol. 443] Q. Or thereabouts. Were you in over-all charge of his case at the Clinic?

A. For most of that time, yes, sir.

Q. I assume other doctors also worked on his case there at the Clinic, is that correct?

A. That's right.

Q. I take it, however, that you were familiar with all tests and procedures of that kind that were performed on Mr. Gallick's case?

A. In the course of his care, yes, sir.

Q. So that whatever findings or lack of findings were made there while he was a patient, you were acquainted with, is that correct?

A. Yes, sir.

Q. Now, let me ask you this question, Doctor:

Have you ever talked to Dr. Heller, the first doctor who ever saw Mr. Gallick?

A. No, sir.

Q. Have you ever had any medical conference with Dr. Ippolito on the case?

A. No, sir.

Q. Now, during the time—well, let me ask you this: At the time that Mr. Gallick entered the Cleveland Clinic, was there a diagnosis, an admitting diagnosis, entered on your records?

[fol. 444] A. I can't give you that answer without—

Q. Well, we have the records here, and I am not sure I follow these records particularly probably you can turn to it much quicker than I can.

A. All right, sir. The first diagnosis of consequence by a staff doctor recorded is by the Dermatology Service which is pyoderma-gangrenosa.

Q. What is the date of that?

A. July 30, 1956. Now, this is a clinical impression. This is not a diagnosis.

Q. I understand. That was the impression at that time of your doctor there as to what he was suffering from?

A. Yes, sir.

Q. Now, at the time he entered the Clinic, did I understand you to say that he gave a history?

A. A history was taken from this man, yes, sir.

Q. And in that history did he tell you that he had had an insect bite back in about August of 1954?

A. The first time I saw this man he did, sir.

Q. Well, did he give you a particular date on it or time or how did he describe as to when it had happened?

A. I saw this man more than two years after his injury.

Q. I understand. I am just wondering what your history shows on that particular point. Will you turn to it and see?

A. The initial history as taken says it started with an [fol. 445] insect bite on the left thigh two years ago.

Q. Two years ago?

A. Yes.

Q. Let's see, that was taken—

A. In July, 1956.

Q. All right. Now, the admitting impression was given as pyoderma-gangrenosa, is that correct, Doctor?

A. Yes, sir.

Q. Will you tell us the meaning of the medical term pyoderma-gangrenosa?

A. Yes, sir. It is a descriptive term and only a descriptive term.

Q. By that you mean what?

A. It describes three things. Pyo means pus. Derma means skin. And gangrenosa means necrosis.

Q. In other words, it describes the appearance of the skin condition, is that the idea?

A. Yes. It does not, however, describe what he also had, which was exposed necrotic muscle, tendon, vessel, nerve and bone.

Q. But the term pyoderma-gangrenosa does not include a description or reference to any cause?

A. No, it does not.

Q. In other words, take a diagnosis of diphtheria, I take it that describes the condition and the cause at the same [fol. 446] time?

A. A cause in the terms of the organism involved, yes.

Q. But this particular diagnosis here, or this term pyoderma-gangrenosa, is just descriptive, it does not relate to the cause?

A. As far as most of us would be concerned, there might be some divergence of opinion on it.

Q. Very well. So that the admitting impression was simply a descriptive one, is that right?

A. Yes, sir.

Q. Was any formal diagnosis entered following that?

A. By formal diagnosis, we would mean a pathological diagnosis, which would mean specifically that this formal diagnosis would be on the chart as soon as we had a pathologic section.

Q. Well, does there come a time in your record there when a formal diagnosis was entered?

A. Yes, sir.

Q. Will you tell us when that was and what it was?

A. The first operative procedure was on August 13, 1956, and the tissue diagnosis was—well, I don't find it. I can find it some time here.

Chronic ulceration, suppuration, necrosis.

At no time was the word pyoderma-gangrenosa on a pathological report, to my knowledge.

[fol. 447] Q. But is that pathological description, once again, just a descriptive term?

A. Yes, but resulting from the study of tissue sections.

Q. But still a descriptive term of the appearance?

A. Well, the appearance on microscopic examination, yes, sir.

Q. Doctor, at the time of Mr. Gallick's final release

from the hospital, which I think you told us was perhaps last July, at the time he was taken from your hospital out to Highland View, was there a diagnosis entered?

A. The same diagnosis.

Q. What was that?

A. Chronic ulceration.

Q. Chronic ulceration?

A. Yes.

Q. Once again, just a descriptive term?

A. Yes.

Q. Of the appearance of his condition, is that correct?

A. Of appearance, yes, sir, that is what our diagnoses are based on.

Q. It does not relate to the cause, the basic cause?

A. It doesn't relate to the bacterial cause or the virule cause, no.

Q. Or some other cause if another cause exists?

A. Of the immediate cause. In terms of organism, no. [fol. 448] Q. Now, all the time that he was there at the Cleveland Clinic, Doctor, did you ever determine the basic cause of Mr. Gallick's condition?

A. You mean in terms of this organism that we are talking about?

Q. Well, do you know that we are talking about an organism, or is that theoretical?

A. For the moment it is theoretical. I don't know what the immediate cause was.

Q. All right. In other words, after two years at the Cleveland Clinic the folks out there still did not determine the immediate cause of his condition?

A. We found no bacteriologic or virule, allergic, malignant, neoplasma origin for his ulcers.

Q. In other words, you found no medical explanation for his ulcers?

A. Medical, again, from the standpoint of immediate cause. We still felt that it was on the basis of an insect bite.

Q. Did you ever make any such entry in your records, Doctor, as you have just expressed there?

A. Well, I have no—I don't know what my specific notes

are, because our notes would be made primarily by our resident, our fellows, our associates and—

Q. Doctor,—

Mr. Dudnik: Please, let the doctor answer.

[fol. 449] Mr. Leasure: I thought he had finished.

Mr. Dudnik: No, he had not. He said "and."

A. And the basic history as recorded would be the history. Unless we disagreed with it, we would not write another history comparable to it.

Q. Doctor, I am not talking about a history. My question was—perhaps it would save a little time—my question was whether you ever entered any diagnosis in your record that his condition was secondary to an insect bite?

A. This is not a pathologic diagnosis, sir.

Q. Let's approach it this way.

A. I mean, that is something that is history, not verified by tissue section.

Q. In other words, it is history not verified by your medical studies?

A. No medical study would ever establish a distant origin, or something like that.

The medical study would be something which would establish the presence of an organism, of a virus of some specific cause within this individual's body at a given moment.

[fol. 450] Q. Now, you mentioned bacteria and virus. There are other things, too, are there not, such as allergy, sensitivities, systemic disease, or conditions?

A. Yes, sir. We reviewed every one of those.

Q. You just didn't find the answer any place here, did you?

A. Not in terms of what you mentioned, no, sir.

Q. So you still don't know why his ulcers didn't heal up and you don't know why new ones developed, do you?

A. This is correct.

Q. And that is after two years of study out there at your hospital?

A. Yes, sir.

Q. Now, if you will follow me, Doctor, through your

doctors' notes there, is there an entry early—I don't have the exact date of it down here—diagnosis of pyoderma-gangrenosa, but of questionable etiology?

A. I am sure, I am sure there is such a diagnosis registered, because to us etiology again, implies the immediate causative effect which is present in a patient.

Q. That is the actual producing cause of the lesions, the etiology?

A. Yes, such as bacteria or virus.

Q. Or—

A. An allergy, neoplasm.

Q. Or—

[fol. 451] A. Or a number of things which we could name.

Q. Systemic diseases, infections?

A. These are all considered what we call a differential diagnosis, which are all of the possibilities.

Q. And having made a differential diagnosis, you still have not been able to determine the—I want to get the right word, I don't want you to quarrel with me—I think you used the word immediate, the producing cause of these ulcers?

A. The immediate producing cause, yes.

Q. And their failure to heal?

A. Yes.

Q. Now, Doctor, I think I will use this blackboard over here, and I hope you will give me a little latitude on my lack of knowledge.

Can we agree that there is one group of diseases in human beings that might be called infectious diseases, by virus or bacteria?

A. Yes, sir.

Q. Another group, what would be a designation of what I have in mind are systemic conditions, like diabetes and things of that kind that are not from an infection, but—

A. Systemic.

Q. It is a disease?

A. Systemic disease.

[fol. 452] Q. Then would a third category be allergies and sensitivities, not being too technical about it?

A. You could call it systemic disease.

Q. Well, since you have used those three terms here, let me get it down here, anyway.

Now, is this a fact, Doctor, so there is no misunderstanding, that after two years of study on it at the Cleveland Clinic you have not been able to determine whether his ulcers were caused by or failed to heal by reason of some infection or because of some systemic disease or allergy, you just haven't been able to put your finger on?

A. Well, we can say one thing, and that is an ulcer is an infection. I mean, the presence of an open wound implies chronic infection.

Q. Well, let me ask you this, Doctor:

Don't we have ulcers developing, let's say, in diabetes?

A. Yes, sir, and they all become chronically infected.

Q. They become infected after they first develop in that instance, isn't that correct?

A. Well, we are talking about the chicken and the egg, so to speak.

Q. All right, it is pretty hard to tell which comes first, the chicken or the egg?

A. And the ulceration represents a whole.

[fol. 453] Q. Is this fair, then, that due to a systemic disease the skin can become weakened to the point where a sore develops, and it gets to be a pretty close question as to whether the sore develops before the bacteria gets there, or the bacteria gets there just at the time the skin is breaking down, is that about it?

A. That could be. This is a possibility which we considered in our differential diagnosis, in this type of a problem.

Q. So that when you say every ulcer is infected, you mean that there is infection in every ulcer?

A. Yes, sir. One way or another, the ulcer and infection are part and parcel.

Q. One way or another, the infection gets into an ulcer, we won't quarrel about the chicken or the egg. Okay.

Now, of course, infection is all about us, that is, bacteria?

A. Yes, sir.

Q. At all times, is that correct?

A. Yes, sir.

Q. No matter how clean you keep your hospital, there still are sources of infection out there, is that correct?

A. Yes, sir.

Q. There are sources of infection right in this court room?

A. Yes, sir.

Q. On our clothing?

[fol. 454] A. Yes, sir.

Q. On our skin?

A. Yes, sir.

Q. No matter how clean we try to keep ourselves, in our hair, under our fingernails?

A. Yes.

Q. And in the air, too, right?

A. Yes, sir.

Q. Is this a fact, that while he was at your hospital you were never able to determine the etiology in his case?

A. Yes, sir, we found no systemic disease, allergy, or the equivalent.

Q. And you didn't find any type of infection that accounted for the failure to heal of these ulcers, did you?

A. Well, we found the ulcers chronically infected, yes.

Q. At the time he got there, you say every ulcer, once it is an ulcer, becomes infected?

A. Yes.

Q. But did you find any specific infection that refused to yield to your treatment and thereby you deemed that as the specific cause of the ulcer?

A. The infections in the ulcers refused to respond to treatment. If you are talking about a generalized affair like meningitis or spinal cord involvement, and so on, no, we found no specific source of an infection in the body.

[fol. 455] Q. Did your bacteriological studies show the varying types of infection in the ulcers?

A. It showed varying organisms.

Q. All right, so one would be there, you would find that, and you take another smear, that would be gone and something else would be there?

A. Yes, sir. This is very common.

Q. Because every time you have an open sore it is going

to pick up infection through the air, through contacts, and other means?

A. Very true.

Q. So you still after all these studies are not able to tell us the immediate cause of his condition?

A. Very true.

Q. So you can't say it falls in this category, and you can't say it falls in this category, right (indicating on blackboard)?

A. I can say that we are dealing with a chronic infection, whereas I can't say that we are dealing with a systemic disease or allergy. That is as far as we can go.

Q. Well, if it is a systemic diseases or allergy, you haven't found it?

A. Yes, sir.

Q. It could be that, couldn't it?

A. It is a possibility.

[fol. 456] Q. And if his ulcers are caused by a systemic disease or allergy, they would still be infected, wouldn't they?

A. I would think so, yes.

Q. So simply the fact that you found them infected still doesn't decide which category his case falls in, is that correct?

A. No, but it determines how we investigate this man, and when we complete a series of investigations, so far as our abilities and medical knowledge permits, we rule out the various things which we consider as possibilities, namely, the systemic diseases and the allergies.

Q. You say you rule them out, you mean you didn't find anything?

A. This is what we mean by ruling out—

Q. But you can't say that there isn't something there in that category, namely, systemic disease or allergy?

A. It is always a possibility, yes.

Q. Until you find the specific and immediate cause you can't really rule out anything, can you?

A. Not a single thing.

Q. And you were not able to find a specific or immediate

cause, so we still have the possibility that his basic trouble falls in either one of those two categories up there?

A. Possibility, yes.

[fol. 457] Q. Now, will you look at your record under date of January 8, 1957?

He had been there about six months by that time. Do you have it there?

A. Yes, sir.

Q. Is this entry there, "No etiology found so far"?

A. Yes, sir.

Q. And by that time what generally—without going into great detail—what kind of tests had you conducted in an effort to locate the cause of his trouble?

A. He had already had the most important tests done on several occasions, namely, the pathologic study of the tissue which had been removed on one, two, three, four, five, six, probably seven separate occasions he had had operative procedures. Perhaps it is more. I haven't checked it carefully, on which pathologic study had been done.

Q. All right, that is studying tissue?

A. Studying tissue, which are most important, and bacteriologic studies had been carried out on entry, and bacteriologic studies were carried out at intervals on these chronic infected wounds.

Q. And then will you look for March 1, 1957? Is this entry in there, "Etiology never identified"?

A. Yes, sir. You are talking about interns' and residents' notes, not that this is significant, but as far as this intern [fol. 458] who saw him he felt from reading the record, yes, no immediate etiologic factor.

Q. What is the definition of the word etiology, Doctor?

A. Cause.

Q. Thank you.

A. But by etiology we mean immediate cause.

Q. In other words, the cause which when cleared up will heal the patient?

A. Yes. That is reasonable.

Q. Now, upon discharge on April 13, 1957, do you find this entry, "unknown etiology"?

A. Yes, sir.

Q. Who made that entry?

A. One of my residents.

Q. And then upon admission again on April 25, 1957, was this impression entered, "Ulcers of legs, unknown origin"?

The Court: What is this date?

Mr. Leasure: April 25, 1957.

A. Yes, sir.

Q. That is there. All right. Now, look at April 30, 1957, do you find this entry, "Main trouble not yet diagnosed as to etiology"?

A. Yes, sir.

Q. Then was he admitted again on June 27, 1957?

A. Yes, sir.

[fol. 459] Q. Was this entry made, "Ulcers of right leg of unknown origin present for two and a half years"?

A. Yes. It was made by my fellow.

Q. Beg pardon?

A. Made by my junior fellow.

Q. All right, working under your supervision, I assume?

A. Yes.

Q. Now, look at February 5, 1958, do you find this entry—no, February 13, I believe it is, 1958, do you find an entry covering the blood cultures at that time?

A. I do not, sir.

Q. Well, were your blood cultures sterile in this case?

A. Were they sterile?

Q. Yes.

A. Usually not, sir.

Q. Well, I have a note here, February 13, 1958, of a blood culture being sterile.

A. Oh, I am sorry, blood cultures, as far as I know, yes, sir, excuse me, were sterile. I thought you were referring to—

Q. You didn't identify any infection in the blood?

A. No, not that I know. Now, this does not mean that it can't be there. This is just—it just means that on the particular occasions when blood was drawn, they did not grow out organism in the usual manner, putting them on

[fol. 460] plates, and so on. It does not mean that there were not organisms there.

Q. Of course, we know anything is possible. But on the occasions when you took blood cultures, you didn't find anything?

A. No, there was no blood stream material, what we call septicemia, blood stream infection.

Q. Now, will you look under date of June 12, 1958, Doctor, do you find this entry, and I am not sure I can read the writing, "Chronically ill man who has a disease of unknown cause"? I believe—"who has a primary disease of unknown cause."

A. On what date, sir? June 12th?

Q. Wait until I look for it again. June 12, 1958. Do you find an entry of June 12th?

A. Yes. There are about 10 entries here and I just missed it, obviously.

Q. All right, will you take a moment?

A. All right, go ahead. "Chronically ill man who has a primary disease of unknown cause," yes, sir.

Q. Who made that entry?

A. I hate to say. I can't read his name. It is not mine.

The Court: It isn't yours?

A. Not mine or out of my service. This is someone who [fol. 461] was asked to see him for a specific set of symptoms typified as a peculiar state of response to pain, and so forth, and so forth.

Q. Doctor, I take it—

A. This is an expert that we called in for this purpose.

Q. That brings me to this question:

I take it that although you are a plastic surgeon and he was under your general care, that you did from time to time call in experts in other fields when you wanted the benefit of their knowledge and opinions on this case?

A. Almost constantly, sir.

Q. Trying to find out what the trouble was?

A. Yes, sir.

Q. Doctor, in view of the hypothetical question that was asked you, I want to ask you a few questions about that.

By the way, when it was stated to you this morning by Mr. Dudnik, is that the first time you had heard it or seen it?

A. So far as that specific document, yes.

Q. Had Mr. Dudnik talked over that subject with you previously at all?

A. We had discussed Mr. Gallick, yes, sir.

Q. No. Have you discussed a hypothetical question of that general nature?

[fol. 462] A. I don't think we talked about it as a hypothetical question, because we had discussed it in terms—

Q. Is it fair to say that before he asked you the question, he knew what your answer was going to be?

Mr. Dudnik: Your Honor, that is an unfair statement.

The Court: The objection is sustained.

Q. Well, have you discussed that general subject with Mr. Dudnik, as far as him reading the question to you?

A. Yes.

Q. Now, Doctor, and I want you to give us a complete answer to this question, if you will, please:

Will you tell us exactly how in response to the hypothetical question you arrived at the conclusion that you expressed?

A. My reasoning on this has to start with the patient as I saw him and treated him; and on the history which so far as the hypothetical question is concerned, is presented to me as established facts.

This man had massive ulcerative disease which from a medical standpoint, and as far as medical evidence is concerned, can be traced back directly to something related to a bite from some insect which was observed and found to be a small red mark.

[fol. 463] Over a specific period of time this small red mark increased in size.

At the end of six to seven days this red mark had increased to something much larger, with what we are told had a head on it.

And we must assume that this lesion at this time is the same lesion which started at the time of the original injury.

From this point on there is steady progress, all of which is verified medically.

From this point we have our own history in terms of the record. We must carry our basic reasoning back one step further, and that is that the presence of filth, of rats, of dead vermin, of stagnant water, predisposes to disease, predisposes to the growth of insects and the like.

This man was bitten in close proximity to such an area of stagnant filth, and it is only logical and we must assume that the probability is there that whatever it was in the insect, in the bug, is related to the presence of that area.

Q. Doctor, is that your complete answer?

A. Yes.

Q. Doctor, do you have any specialized knowledge of the habits of insects?

A. No, I do not, sir.

[fol. 464] Q. Except for whatever might have been stated in the hypothetical question, Doctor, can you say, first, whether Mr. Gallick was ever bitten by an insect?

A. This information is given to me in the hypothetical question.

Q. And except for that you have no knowledge on the subject?

A. This is strictly on the basis of the hypothetical question.

Q. Except for the hypothetical question I take it you have no knowledge, then, as to where an insect, if any, came from prior to the time that it bit Mr. Gallick?

A. My reasoning is on the basis of the question.

Q. Except for the hypothetical question you would have no knowledge or opinion as to how long the insect, if there was an insect up his pants leg, had been there prior to the time that it is said to have bit him?

A. That is presented to me, sir.

Q. So that except for the hypothetical question, you have no knowledge as to what, if any, effect the presence of rats or pigeons or water would have upon any insect in the area, is that correct?

A. Not quite correct, sir. Since we know, and in my own

opinion the presence of such an area would predispose to both insects and disease.

[fol. 465] Q. Doctor, let's assume that the area involved here is bounded by the Cuyahoga River on two sides—I am using Plaintiff's Exhibit No.—

Mr. Dudnik: I don't know whether we marked it as an exhibit.

Mr. Leasure: Shall we mark it now?

Mr. Dudnik: Yes, absolutely.

Q. Can you see that, Doctor?

A. Yes, sir.

Q. Let's assume that this is the Cuyahoga River here, and again up here, and that it bends around down there.

Let's assume that this insect bite is alleged to have taken place under this bridge here, inside the red circle.

Let's assume that the distance from the bridge to the river on the down side of the picture is perhaps two to three hundred feet, and up the other side is a proportionate distance of several hundred more feet.

Doctor, wouldn't you be interested in knowing also what the sewage conditions were in the Cuyahoga River which is close by there, in addition to the other facts you were given?

A. In terms of probability?

Q. In terms of what, if any, effect it might have on insect life and health conditions in the area.

A. I am sure that any number of factors may contribute [fol. 466] to this thing.

Q. Right. Well, let's assume that raw sewage for many years had been dumped into the Cuyahoga River, both upstream here so that it comes down past here, or is dumped over in here, so that the Cuyahoga River at all times involved here had raw sewage in it, that could involve into this picture, too, could it not?

A. It is a possibility, sir.

Mr. Dudnik: Did you say possibility?

A. Possibility.

Q. In other words, that affects the general health conditions in the area, does it not?

A. Yes. Many things for distances of many miles, I am sure, can affect health conditions.

Q. Do you have any specialized knowledge, Doctor, of the flight habits of insects, how far they move and how fast they move?

A. I do not, sir.

Q. With the exception of the knowledge that I think all of us laymen have from our own personal experience, do you have any knowledge of what—any specialized knowledge—of what attracts particular insects?

A. I don't quite understand your question, sir.

Q. Well, can we agree that since you don't have specialized knowledge of insect life, that you wouldn't have [fol. 467] specialized knowledge of what attracts insects, what they feed on and where they are likely to be?

A. You mean why a mosquito bites a human being?

Q. No. What conditions, let's say, attracts particular types of insects? I am talking about specialized knowledge, now, as distinguished from what we all observe and learn from our everyday lives.

A. I can say in terms of medical specialized knowledge, a medical, a doctor is expected to understand principles of sanitation, and as such we know that the presence of stagnant water is traditionally a breeder of water insects, and we know that the presence of rats implies the presence—or of various insects that feed on it, such as the plague-carrying insect which is a rat flea which lives on the rat both living and dead, and it is the cause of the famous plague episodes in history.

We know a certain number of facts which are specialized perhaps in the medical sense but not specialized for an entomologist or an insect expert.

Q. So that there are certain recognized diseases which can be traced to particular insects?

A. There are a certain number, yes.

Q. You haven't found any such disease in the case of Mr. Gallick, have you?

[fol. 468] A. No, sir.

Q. Doctor, do you know of any medical reason why ulcers developed in other parts of Mr. Gallick's body where there was no history of insect bite?

A. We have no proof.
Q. You can't say!
A. We have no facts such as—
Q. All right.

Mr. Dudnik: Just a minute, please, sir. Finish your answer.

Mr. Leasure: I think he finished his answer.

Mr. Dudnik: "Such as," you left him in the air.

The Court: He may finish his answer.

Q. Go ahead.

A. Such as the specific causative agent, primary causitive agent which was mentioned before.

Q. I am asking you, Doctor, whether you can tell us why other ulcers developed. If you can, I would like to have you tell us; if you can't, I would like to know that.

A. Not specifically, no, sir.

Mr. Leasure: Do we have the Highland View Hospital [fol. 469] record here?

Mr. Dudnik: Yes. We got it yesterday afternoon.

Mr. Leasure: Did you enter that?

Mr. Dudnik: May we?

Mr. Leasure: Yes, please do.

OFFER IN EVIDENCE

Mr. Dudnik: Somewhat as an interruption, by agreement, we offer the Highland View Hospital records, Plaintiff's Exhibit No. 18.

(Plaintiff's Exhibit 18 was marked for identification.)

Mr. Dudnik: We offer that in evidence, and these, your Honor, are photostats of the originals. The originals are staying at the hospital.

The Court: They will be accepted.

Mr. Leasure: If I may have just a moment, your Honor, I am trying to locate something here.

By Mr. Leasure:

Q. Well, it is in there someplace. Will you tell us this, Doctor, since this has been admitted into evidence, and this will be subject to location later, I simply want to find out what the medical meaning of this entry is.

First, do you know a Dr. Binkley here in town, a dermatologist?

[fol. 470]

A. No, sir.

Q. Will, without reference to that, will you tell me what this entry means medically?

Mr. Dudnik: Mr. Leasure, are you quoting from a record?

Mr. Leasure: Yes, I am.

Mr. Dudnik: From which hospital record?

Mr. Leasure: The Highland View Hospital record.

Mr. Dudnik: That is all right. You will show it to me later?

Mr. Leasure: Yes.

Mr. Dudnik: Fine.

Q. "Infection"—and this, of course, is in the case of Mr. Gallick—"Infection is not etiologic. The tissue (allergic) reaction is basic."

What does that mean medically, Doctor?

A. That means very little to me, sir. Will you read it again, please?

Q. "Infection is not etiologic. The tissue (allergic) reaction is basic."

A. I don't think I understand what is implied.

Q. Well, when the statement is made medically that in-

[fol. 471]

fection is not etiologic, does that mean that infection is not the cause?

A. To use the word etiologic to modify the noun infection is something that I would not use myself.

An infection can be an etiologic agent. In other words, if you get an abscess up in your brain you may have an infected toe, and that is the etiologic agent for the brain abscess. And the etiologic abscess for the infected toe may be an organism like staphylococcae. But the word etiology just means cause, and infection means state of chronic in-

flammation or acute inflammation, such as we have discussed.

Q. Well, would it be better English to use etiological instead of etiology?

A. No. Etiologic is all right except that it isn't an adjective that I would use in that context. I don't know what is implied by that statement that infection is not etiologic. That means nothing to me.

Q. Well, what does this last part of it mean, if anything, to you medically, "The tissue (allergic) reaction is basic"? That doesn't mean anything to you?

A. It doesn't mean a thing, sir. It may mean something in context. But out of context it has no meaning at all.

Q. Actually, in the case of Mr. Gallick, Doctor, during all the time he was in your hospital you were trying to find [fol. 472] out what, if any, infection he had, is that correct?

A. If he had a specific infection which was—

Q. The causative agent?

A. —the single cause of ulceration.

Q. You didn't find any such infection?

A. No such single etiological agent.

Q. You found an infected ulcer?

A. Yes, sir.

Q. But you didn't find a single infectious agent?

A. A single organism that we could attack, no, sir.

Q. You didn't find any infectious cause of his various ulcers?

A. No, not in terms of a single one.

Q. Or a double one?

A. All right, or a double one, yes, sir.

Q. Okay. You were also looking for systemic diseases or allergies which might account for the formation of his ulcers and their resistance to heal?

A. Yes, sir.

Q. You never found anything in that field?

A. No, sir.

Q. In other words, you just didn't find anything?

A. Not in terms of a specific etiologic agent, no, sir.

Q. In terms of a specific cause?

A. Direct cause, yes.

[fol. 473] Mr. Leasure: That is all.

Redirect examination of Dr. Robin Anderson.

By Mr. Dudnik:

Q. Doctor, will you refer to your notes on August 1, 1956?

First, Doctor, on page 2 of the admission, the history, do you have the history on page 2? Will you read the history? What is the date of that history?

A. July 27, 1956.

Q. Would you read that history?

A. (Reading): "This 55-year old white male has had for two years two large open wounds on the dorsal side of both thighs and two smaller ones on the dorsal side of the left ankle, and in the crux. Muscles, tendons, and so forth, are free hanging in the open space and green viscous pus is all over it."

Should I continue?

Q. Is there anything further? Yes.

A. (Reading): "It started with an insect bite on the left thigh two years ago. When this made deeper infiltration, Dr. Ippolito of Garfield Heights did a skin graft from the right thigh on the left, and a process started then on the right leg, also, too, and started spreading.

"Scars are visible in the left axilla, the armpit, and over the right chest and on the right knee."

[fol. 474] Should I continue?

Q. Doctor, will you turn to August 1, 1956? When the case came to you, Dr. Anderson, is there a note in regard to that from the Dermatology Department?

A. "Transferred to Dr. Anderson. This is a surgical problem."

Q. That is what it says?

A. Yes.

Q. Doctor, do you have a note on February 18, 1957? Will you turn to that entry?

Mr. Leasure: What was that date, again?

Mr. Dudnik: February 18, 1957.

Q. Is there a note there relating to non-systemic origin?

A. This is a note by Dr. Battle.

Q. Who is Dr. Battle?

A. The head of the Hematology Department.

Q. What does he say?

A. "The review of the history and previous studies including two special counts"—these are special laboratory red blood cell, white blood cell counts, and smears, done by the hematologists instead of the general laboratory—"including two special counts and a physical exam do not suggest a systemic disease to me."

[fol. 475] Q. Now, Doctor, will you turn to February 26th of '57, where it talks about diabetes.

A. This is from the diabetic service.

"Patient regarded as non-diabetic and not to receive diet instruction unless proven otherwise."

Q. Doctor, do you have a note on February 5, 1958, relating to whether it is or it is not a systemic disease?

A. A note of Dr. VanOrdstrand.

Q. Who is Dr. VanOrdstrand?

A. Dr. VanOrdstrand is one of the medical men and head of the medical chest diseases. "Concur with above." This is a note which says essentially no systemic disease. "Concur with above.

"I am at a loss to explain a systemic basis for this patient's problem."

Q. Now, Doctor, was there a time when you saw the tissues and muscles eaten away, until the bone was exposed?

A. Yes, sir.

Q. What areas, Doctor?

A. Well, both of the thigh areas and the knee area on the right side showed this through almost the entire course that he was in our institution.

Q. And the bone was exposed?

A. Yes, sir.

[fol. 476] Q. Doctor, what is the meaning—how many doctors, approximately how many doctors saw him at the Clinic?

A. Well, I am sure that at least 15 or 20 staff doctors saw him, and at least a hundred or more residents and fellows.

Q. Doctor, what is the meaning of the initials RO, or the meaning of the words "Rule Out" in a hospital?

A. Well, any time we are attempting to make a diagnosis without something that we consider reasonably incontrovertible proof, such as tissue diagnosis from the pathologist, or something which the bacteriological service would give us as a specific organism, in other words, something that we can accept as close to fact as possible, we have to go through a mental process of setting up for ourselves a list of the likely possibilities, and some which are not likely possibilities, and until we come up with a specific diagnosis, something which tells us what the problem is in our opinion, and give us something that we can approach medically, surgically, or whatever the method, then we must systematically try to rule out, try to eliminate one after the other of the various possibilities, until we make a diagnosis either by hitting one with a specific test, or by reaching a diagnosis by exclusion.

In other words—

Q. I take it—I am sorry.

[fol. 477] A. The end point would be the same. We try to reach a definite diagnosis and eliminate or rule out the various possibilities we have set up in our own particular list.

Q. In other words, you eliminate the possibilities and you try to deal in probabilities, is that the answer?

A. Yes, sir.

Q. So that when you told Mr. Leasure that it is possible that he had all of those diseases which you ruled out, what is the probability as to whether he had those diseases?

A. Very, very small. In fact, extremely small.

Q. Then you had ruled out all of the diseases that you mentioned which I am not going to repeat?

A. Yes.

Q. Including systemic diseases?

A. Yes.

Q. And allergy?

A. Yes.

Q. Now, Doctor, I believe you told Mr. Leasure in answer to a question that anything is possible?

A. Yes.

Q. In medicine do you deal with possibilities or probabilities?

Withdraw that question, and put it this way: Are you looking for what is probable or possible in medicine?

[fol. 478] A. If we are going to treat we must have probabilities.

Q. Now, when you were shown this picture of the area, I believe you said that it was possible that that insect could have come from the river or from 500 yards away, did you not?

A. Yes, sir.

Q. Knowing all the facts that you do, both from history, from treatment, and from what you have been told by me as a fact, what is the probability, not the possibility, but the probability as to where that insect came from?

A. The closest location is the probable location.

Mr. Leasure: Just a moment. I want to object as being outside the doctor's field of knowledge. Of course, that involves, I think, a specialized knowledge of insects, their habits, and so forth, which he admitted he does not have.

Mr. Dudnik: He also stated an answer to the hypothetical question. This is just redirect.

Mr. Leasure: That is one of my objections to the hypothetical question. It goes entirely outside his field.

The Court: The objection is overruled. The doctor may answer.

Q. Had you finished your answer?

[fol. 479] A. The probable location is the closest site which in this instance would be stagnant, swampy water.

Mr. Dudnik: I think that is all.

Recross examination of Dr. Robin Anderson.

By Mr. Leasure:

Q. Well, in view of those questions, Doctor, this will take a little more time.

Do you know of any insect that is a half-inch in diameter and two inches long that is known to attack man?

A. Not specifically, sir, no.

Q. I take it, then, you have no ideas as to what the habits of such an insect, if it exists, might be?

A. No, sir, I do not.

Q. Doctor, you were asked about ruling out systemic diseases, and as I understand it, you undertook a course of testing in which you endeavored to locate certain known systemic diseases, if they exist in Mr. Gallick?

A. Yes, sir.

Q. You didn't find any known systemic conditions or diseases in his case, is that correct?

A. Neither I nor the consultants.

Q. You also attempted to locate a primary and specific infection in his body?

A. Yes, sir.

[fol. 480] Q. You didn't find that either, did you?

A. Not in terms of the agent which we have discussed.

Q. So you ruled out specific and primary infections, too, did you not, along with systemic diseases?

A. So far as we know, we do not have a specific etiologic agent.

Q. So, in fact, you just ruled out everything that you know about which leaves them what, Doctor?

A. A very ghastly sick man.

Q. Yes, from some—

A. Who received a bite and who developed something which followed a bite.

Q. But you don't know it is?

A. I know that it is very desperate ulceration which still progresses.

Q. You don't know the primary or specific cause of it?

A. Not the organism, no, sir.

Q. And if you found that tomorrow or next week or next year, you could well find that it has absolutely nothing to do with an insect bite, isn't that correct?

A. No, sir. On the basis of the history the insect bite is the only single thing which in our knowledge could have caused this.

Q. Now, Doctor, an insect can cause a sickness or a condition in a human being only in one of two ways, am I correct, [fol. 481] either by injecting a poison or toxin of some kind, or injecting some bacteria or virus?

A. Injection is not necessary. The irritation, the foreign body of a sting, all of these things can produce an inflammatory response. In other words, when you are bitten by—well, if you were struck by a thorn which does not inject anything, you still get an inflammatory response and you may get a severe infection type reaction to it, with ulceration.

Q. I was trying to cover both things, Doctor, and perhaps I didn't make my question clear.

So that whether it is an insect or a thorn or whatever might break your skin, it may introduce an infection?

A. It could be anything. We just have in the hypothetical case it was an insect.

Q. All right, that is still hypothetical, as far as you as a doctor know?

A. That is what is presented to me, yes.

Q. That is right, so you have to take it as presented?

A. Yes, sir.

Q. The only other way an insect can cause a person trouble is through injecting a poison of some kind at the time of the bite or sting?

A. I don't know whether I can agree with you or not, [fol. 482] sir. There may be other ways. I don't know.

Q. Can you name any other ways, that is what I want to find out?

A. No. I am not a qualified expert on that subject.

Q. In all your studies, Doctor, you have found no toxin or poison which would come from an insect which would account for this man's problem, is that correct?

A. Not in the period that we were involved. I would not expect to, no matter what it would have been originally.

Q. Did you look at the Marymount Hospital records?

A. No, sir.

Q. You have never found any specific or primary infectious agent that you can say is the cause of this man's trouble?

A. Not a single etiologic agent, no, sir.

Q. So that if it is due to an infection, and if you should at some time find out what the agent is, the specific infectious agent, it could well be, could it not, Doctor, that it might be the kind of infectious agent that is not involved with insects?

A. Sir, it could be anything under the sun, but the probability here is that if it started with an insect bite, which we must assume, that everything that has gone after the original lesion, the original ulcer, is related to it. This is something which medically we can't ignore and we can't eliminate.

[fol. 483] Q. So that whatever you have said here, whatever opinion you have expressed as to causation, is based entirely either upon the hypothetical question, or what Mr. Gallick had to say at the time he entered the hospital?

A. Yes, sir.

Q. And not from findings made by you at the hospital yourself?

A. I saw no insect, sir.

Mr. Leasure: That doesn't answer the question.

Will you read the question?

(Last two questions and answers read by the reporter.)

Mr. Leasure: I want a direct answer to the question, your Honor. Obviously it is not responsive.

The Court: The answer is not responsive, Doctor.

Q. Do you want the question read again?

A. Yes, I am sorry, sir. Would you read it to me?

(Question read by the reporter.)

A. So far as causation, prior to this patient's being in the Cleveland Clinic, the answer is, yes, it is based on the hypothetical question and on the history as given by the patient, plus the history as given to us from the previous [fol. 484] hospitalization.

Q. The only facts appearing—wait a minute. I think you told us you hadn't seen the Marymount Hospital record. To what were you referring?

A. I have not, sir. The patient was admitted on the Dermatology Service and was referred to the Cleveland Clinic Dermatology Service from Marymount Hospital.

I received this patient in transfer from our own Dermatology Service. So I was not in communication with Marymount Hospital.

Mr. Leasure: Will you read the last part of his previous answer? I want to find out what is meant by it.

(The following was read by the reporter: "Plus the history as given to us from the previous hospitalization.")

Q. I don't understand what you mean by that.

A. Well, when the patient was transferred from the hospital, the previous service I know in this instance was in communication with the service handling him in the previous hospital.

Q. So that can we say that your hospital would have called Marymount and asked them what their history showed?

A. Somebody would have. I can't give you a specific answer.

[fol. 485] Q. So you were still referring to nothing more than what Mr. Gallick had related at the time he entered Marymount Hospital?

A. Yes, yes.

Q. Now, Doctor, just a couple of more questions.

If Mr. Gallick had come to Marymount Hospital and given a history there, had come to your hospital and given a history, and instead of saying that his trouble had started with an insect bite, he had said that his trouble had started with a splinter that he had run in his leg here at the same place, you would be here this morning, would you not, testifying entirely truthful and in your opinion based upon the history that you obtained that his troubles started with a splinter?

A. If we could have had as good a chronologic history with the same medical here, which is documented, one would have to assume yes, it started with a specific thing, be it a splinter or something else.

Q. Or a pimple that he said he scratched, or anything else?

A. If we had it documented, this has to be a possibility, but that is not the case here, sir.

Q. I am talking about the patient coming to you, assuming Mr. Gallick had come to you instead of giving history of an insect bite at this location here on his left leg, he said, [fol. 486] "I ran a splinter into it"?

A. I would have to believe, I would have to believe the history of the patient.

Q. All right, and then you would say that his trouble started with a splinter?

A. If this were the history that were given, I would be forced to believe it, yes, sir.

Q. All other medical facts being exactly the same as they are here, if the history was given of a splinter instead of an insect bite, your opinion then would be that his trouble was caused by a splinter?

A. I think that is reasonable.

Q. And if Mr. Gallick had come to you and given a history of having been bitten by an insect at home, and not at work—

A. Sir—

Q. —you would have to take that?

A. —any of these things are possibilities. It could have been any injury we could conceive of.

Q. So that your opinion, Doctor,—I just want to ask one last question—so that your opinion here as to causation, whatever opinion you have expressed, is based, in so far as an insect bite is concerned is based entirely on Mr. Gallick's history, the one that he gave when he entered the hospital?

A. That and the hypothetical case.

[fol. 486a] Q. That and the hypothetical case presented by Mr. Dudnik?

A. Yes, sir.

Mr. Leasure: That is all.

Mr. Dudnik: Thank you, Doctor, I have no questions.

The Court: May I see counsel?

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

The Court: Let the record show that the plaintiff has filed as of June 16, 1959, his reply instanter, and that there is no objection on the part of defense counsel to the filing of said reply.

Is that right, Mr. Leasure?

Mr. Leasure: That is correct.

The Court: Ladies and gentlemen of the jury, we will now recess for the luncheon period, once more with the

admonition that you do not talk to anyone about this case, not even among yourselves, and you will return at 1:45.

(Thereupon an adjournment was taken to 1:45 p.m., Wednesday, June 17, 1959, at which time the following proceedings were had:)

[fol. 487] Wednesday afternoon session,
1:45 p.m., June 17, 1959

OFFERS IN EVIDENCE

Mr. Dudnik: At this time, your Honor, I wish to offer into evidence Plaintiff's Exhibit No. 19 which is the aerial photo.

(Plaintiff's Exhibit 19 was marked for identification by the reporter.)

Mr. Leasure: For the record, may we have the date when that was taken?

Mr. Dudnik: I would say a few days before the trial commenced. So it would be around between June 1st and the 5th.

Mr. Leasure: We have no objection.

The Court: Without objection it will be received.

Mr. Dudnik: At this time, your Honor, I offer into evidence Plaintiff's Exhibit No. 20, which is the Marymount Hospital bill in the amount of $11,846.45.

Mr. Leasure: May I see that?

Mr. Dudnik: I gave you a copy of it yesterday.

Mr. Leasure: I didn't see it.

The Court: Any objection?

Mr. Leasure: No objection.

[fol. 488] The Court: Without objection it will be received.

(Plaintiff's Exhibits 20, 21, and 22 were marked for identification by the reporter.)

Mr. Dudnik: I offer into evidence Plaintiff's Exhibit No. 22—you have a copy of that.

Mr. Leasure: No objection.

Mr. Dudnik: May I withdraw that, your Honor? I withdraw that for a moment.

I offer into evidence next Plaintiff's Exhibit 21, which is the bill against Mr. Gallick of the Cleveland Clinic Foundation. It is stipulated between counsel that the amount, although they would have to be added up, the total is $21,816.67.

The Court: Any objection?

Mr. Leasure: No objection.

The Court: Without objection it will be received.

Mr. Dudnik: And the bill of Highland View Hospital—

The Court: Is this Plaintiff's Exhibit 22 now?

Mr. Dudnik: Plaintiff's Exhibit No. 22, your Honor, in the amount of—up to May 31, 1958, in the amount of $6,000—

[fol. 489] Mr. Nurenberg: Mr. Dudnik, May 31, 1959.

Mr. Dudnik: I am sorry. May 31, 1959, in the amount of $6,174.

Mr. Leasure: No objection.

The Court: Without objection it will be received.

Plaintiff Rests

Mr. Dudnik: At this time, your Honor, the plaintiff James Gallick rests his case.

* * * * *

[fol. 495] The Court: Gentlemen, before I act on the motion that the Defendant presented yesterday, I think Mr. Leasure said you may have some further information you may want to present to the Court.

Mr. Leasure: Yes, your Honor. There is one case we wanted to check particularly to see what was involved as well as perhaps other things.

Mr. Hadden checked on that, so he will make the statement.

(Thereupon further argument was had with respect to the motions.)

Court's Ruling on Motion to Strike Each of the Specifications of Negligence

The Court: Counsel for Defendant has made two motions. The first motion was one to strike each of the

specifications of negligence. The second motion was one for a directed verdict.

The Court having now arrived at a decision on these motions will make its rulings.

First, as to the motion to strike the specifications of negligence. Specification of negligence number five was stricken by agreement of counsel. The Court therefore will pass to the remaining specifications.

[fol. 496] The Court feels specification of negligence number one is also set out in specification number six, and therefore is redundant. The motion to strike specification of negligence number one is granted, and the Court therefore orders specification of negligence number one stricken from the amended petition.

The motion to strike specification of negligence number two is granted, and the Court therefore orders specification of negligence number two stricken from the amended petition for the following reasons:

A. It requires a specific affirmative act on the part of the Defendant and does not state negligence on his part.

And B, because the experts' testimony in this case definitely established that draining alone was not a proper solution to the area complained of.

The motion to strike specification of negligence number three is granted, and the Court therefore orders specification of negligence number three stricken from the amended petition, for the reason that there was no testimony that chemicals would eliminate the condition complained of, and for the further reason that the law does not require the Defendant Railroad to take a particular affirmative course of action, rather, under the law it is merely re-

[fol. 497] quired to provide a safe place for its employees to work, and further it is not permitted to be negligent in its dealings with its employees either by a negligent act or omission.

The remaining specifications of negligence set out in the petition are well stated, and therefore the motions to strike specifications of negligence number four and number six are overruled.

Having disposed of the motions to strike the specifications of negligence, and since two specifications of negli-

gence remain, the Court will now rule on the motion for a directed verdict.

During the course of the trial and after this motion was made, the Court examined all of the cases cited by both the Defendant's and the Plaintiff's attorneys.

ORDER OVERRULING MOTION FOR A DIRECTED VERDICT

The Court does not now intend to discuss the applicability of these various cases to the motion before it. Rather, it will simply state that based on the fact that this case is brought under and controlled by the provisions of the Federal Employers Liability Act, and since the Court is bound by the cases previously decided thereunder, said motion is overruled.

* * * * * * *

[fol. 498]

Defendant's Case

Mr. Leasure: Mr. Delaria, will you please step forward, please?

Thereupon the Defendant, to maintain the issues on his part to be maintained, called as a witness PAUL DELARIA, who, being first duly sworn, was examined and testified as follows:

Direct examination of Paul Delaria.

By Mr. Leasure:

Q. Will you state your name, please?

A. My name is Paul Delaria.

Q. Mr. Delaria, I want you to keep your voice up so that [fol. 499] we all can hear you. Where do you live, Mr. Delaria?

A. I live at 1205 Notre Dame Avenue, Cleveland 4, Ohio.

Q. Have you ever appeared as a witness in a court room before?

A. No, sir.

Q. Well, just try to relax as best you can, and I think things will go along all right.

By whom are you employed?

A. By who what?

Q. By whom are you employed?

A. By the Baltimore and Ohio Railroad.

Q. How long have you worked for them?

A. 46 years.

Q. In what capacity?

A. Foreman.

Q. A particular type of foreman?

A. I got in as an extra garage foreman. Then regular track foreman, section foreman, and then I was for promotion a couple of times, but I want to stay in Cleveland so I am still foreman.

Q. So you have been a section foreman for the B & O?

A. Yes, sir.

Q. Now, back during the time of 1954 did you have a particular section of track or part of the right-of-way of [fol. 500] the Baltimore and Ohio under your jurisdiction?

A. Yes.

Q. As section foreman?

A. Yes, here in Cleveland, yes.

Q. Is that the way the situation worked at that time, that each section foreman had a particular part of the right-of-way or track to care for?

A. Yes, sir.

Q. Did you have people working under you?

A. Yes, sir.

Q. That is, a section gang?

A. Yes, section gang.

Q. Or group of employees working under you, all right. Now, will you tell us, Mr. Delaria, what section of track you had under your control back in 1954, that is, where it started and where it stopped?

A. Well, my section run at that time from where the Yellow Cab is now.

Q. Go ahead.

A. All the way through the flats and what we call Whiskey Island. That is near the lake.

Q. All right. To state it a little differently, did it extend from the west end of Clark Avenue yard up to Whiskey Island?

A. Not at that time, no. From the distillery we call it, [fol. 501] the old distillery plant.

Q. Where is that with reference to Clark Avenue yard, that is what I am trying to find out.

A. That is just east of Eagle Ramp, Eagle Avenue, the bridge.

Q. How far east is that from Columbus Road Bridge?

A. It would be approximately nearly a mile east.

Q. About a mile. All right. Your section started about a mile east of Columbus Road bridge?

A. That is almost center point of the section.

Q. Then it extended up past Columbus Road bridge to Whiskey Island?

A. Yes.

Q. And how far is Whiskey Island from Columbus Road bridge to the west?

A. It is a little better than a mile.

Q. So you had about two miles of track under your supervision?

A. Yes.

Q. Now, when did you first start caring for that section of track, Mr. Delaria?

A. February 1, 1920, '21, 1921.

Q. And you continued to care for that section of track up until what time?

A. Up to around, I don't remember the exact year, but it would have been in 1932, '33. I was out on the road for [fol. 502] about eight years, with my headquarters South Park six years, two years at Brooksville. Then after eight years I came right back here and worked approximately the beginning of the war.

Q. About 1941 or '42?

A. Yes, sir.

Q. You started back on the same section of track as track foreman?

A. Yes.

Q. Then you continued to care for that same section up to what time?

A. I am still there.

Q. Mr. Delaria, this case involves an incident that allegedly happened under Columbus Road bridge. So I want to turn our attention now to that particular part.

Well, let me use, if I may, Plaintiff's Exhibit 4.

Will you take a look at that, Mr. Delaria.

A. That's it.

Q. Is that Columbus Road bridge?

A. Yes, sir.

Q. Is this track that is shown going under the bridge known as the River Track?

A. Yes, sir.

Q. And is that part of the track that is under your [fol. 503] supervision and control as track foreman?

A. Yes, sir.

Q. And it was back in 1954 as well as other years?

A. Yes, sir.

Q. Now, I call your attention to an area to the right-hand side of the tracks there under the bridge. Can you see this where there appears to be some water standing right in here?

A. Yes, a little.

Q. I just wanted to point it out because I want to refer to it in a question.

Now, was there a time when there were two tracks going under this bridge?

A. Yes, sir.

Q. Up to what date or year approximately did that continue?

A. 19—either at the end of '51 or 1952.

Q. And then what was done?

A. Well, I re-arranged the present track.

Mr. Dudnik: Did the witness say "I re-arranged the present track"?

A. I re-arranged it. I was in charge of it. Under my superior's instructions there.

Q. Well, did you take one of the tracks out?

A. I took one track out and re-arranged the other.

[fol. 504] Q. Re-arranged the track. The track that you took out had run to the right or the left of the track—

A. Towards the right or west side.

Q. So the track you took out had run on the right-hand side of this picture?

A. Yes.

Q. Now, Mr. Delaria, before the second track was taken out—well, let me ask you this first, preparatory. Let me draw a little picture here, that would be the best thing I think.

This I intend to be Columbus Road bridge here and the railroad track here. Now, before you took the second track out, was the drainage in this area here along the track approximately the same as it was afterward?

A. It wasn't changed.

Q. It was not changed. So the drainage system was the same?

A. Yes, sir.

Q. What is the drainage in—let's use railroad directions—this would be what?

A. East.

Q. East?

A. And this would be west.

Q. Although geographic directions measure a little different. Now, was the general flow of water in this direc- [fol. 505] tion, toward the east?

A. Yes, sir.

Q. At that time was there also a ditch leading from the area under the Columbus Road bridge to the east up to a drain tile?

A. Yes, sir.

Q. The drain tile started approximately there, just as it does now? You have to answer so he can get your answer on the record.

A. Repeat that?

Q. Instead of just nodding your head.

A. I see, I am sorry.

Q. Now, at the time the two tracks were there was there any problem about clearance of cars under this bridge, the Columbus Road bridge?

A. Yes.

Q. Will you tell us about that, please?

A. I could have printed it myself if you wanted to, the situation.

Q. Beg pardon?

A. I could make a little sketch.

Q. Well, maybe I can help you here. Let's draw a bridge here, this is the bottom of the bridge. May we have that as the track?

A. Do you want me to come down?

[fol. 506] Q. Well, no. Does this make sense to you? Maybe we can use this picture here. Well, just answer my questions and I think we can do it by words rather than getting involved in a matter of diagrams.

Was there a problem about clearance under the bridge?

A. Yes.

Q. What do you mean by that?

A. Well, the one we took out was a little lower than the present one. There used to be a crossover there. Every time we had a high car we just line the crossover, switch them around. Whenever I had this high car, let them go that way.

Then our problem was we had to lower this in order to get the high car through there.

So we dug down, I dug down enough depth so I would be allowed to put some fresh stuff underneath, like slag, to get it out of the mud. Then approximately five or six inches raised. Then we cleaned everything out and we made a path from the track so the people could walk, you know, the brakemen at night.

But we had to have that lower so we drain, couldn't go any higher on that drainage. That's the problem, the height of the car.

Q. I think that explains that. Now, the second track, [fol. 507] the one that you took out, was that called a passing track?

A. Passing track?

Q. And this was called the river track?

A. The river track.

Q. So you took the passing track out and the river track remained?

A. Yes.

Q. Are you telling us then that you lowered the river track a little bit?

A. Yes.

Q. So that it would be comparable to what the passing track had been?

A. Yes, sir.

Q. So you could get clearance on your cars?

A. Yes, sir.

Q. Now, both before and after you took this second track out, did some water attempt to accumulate and stand at about this area here?

A. A little bit, yes.

Q. A little bit. In other words, was it something similar to what is shown in this picture, Plaintiff's Exhibit 4?

A. There haven't been any change.

Mr. Dudnik: I beg pardon. I didn't hear.

Mr. Leasure: "There hasn't been any change."

[fol. 508] Q. Now, it has been suggested here, Mr. Delaria, that all you have to do in order to avoid this water standing is to put some slag over here in this area that is marked with these little curlicue things here, so as to bring the level of the ground up, so the water coming up here will pass right along the ditch and into the drain tile.

Now, have you yourself given consideration to putting slag or some other material in there to lift the level of that ground?

A. The only solution of that is, if you take the bridge out or raise the bridge, which it is the City or County, whatever it is. But if we do that you make—

Q. If you do what now?

A. If you are filling with slag.

Q. All right, go ahead.

A. You make a regular swamp in there, then it won't be safe for the train, because your track would be pumping, and you have a low spot, you have a derailment, and it would be a worse place for the trainmen.

Q. Now, let me ask you this: Let's take this area right here as the area where the water tends to accumulate.

Suppose you fill in this with slag, the water coming from up here, where would the water go then if you raised this level here?

[fol. 509] A. Well, usually back in toward the track. Your track would be so soft that it make unsafe to operate on.

Q. It would come down here under your track?

A. Yes. Probably part of it goes out, but part of it does more damage than anything else.

Q. Now, by going under your track, you mean the water would get under the ties?

A. Yes.

Q. When water stands under the ties, what happens when trains go by?

A. The track gets pumpy, what we call pumpy. It pumped mud.

Q. Pumping ties?

A. Yes, pumping track.

Q. In other words, when the train goes by it tends to go down, pump, and then come up?

A. Yes.

Q. And it throws out the mud and you have a loose track?

A. Yes. Main thing is the drainage.

Mr. Dudnik: Main thing is the drainage?

A. For railroad, for railroad.

Q. In other words, Mr. Delaria, you have to keep the water away from under your track?

A. Yes.

[fol. 510] Q. Now, as it stands down there, do I understand that the water accumulates here instead of accumulating under your track?

Mr. Dudnik: If your Honor please, I have been permitting Mr. Leasure to lead his witness. I am going to insist that he ask the questions rather than lead him, and I object.

Mr. Leasure: This is a summarizing question.

Mr. Dudnik: And I object.

The Court: I recognize that perhaps some of these questions may be leading. I would suggest to Mr. Leasure to keep away from the leading questions as much as possible, but I do recognize that the witness is trying to describe the area there. Proceed.

Mr. Leasure: May I have the question and answer read?

(Last question was read by the reporter.)

Mr. Leasure: Let me revise that.

Q. Do I understand then as the situation now stands the water accumulates alongside the track instead of under the track?

Mr. Dudnik: Objection.

The Court: Objection sustained.

[fol. 511] Q. As the situation now stands, Mr. Delaria, where does the water tend to accumulate, under your track or off the track?

A. Off the track.

Q. Alongside the track?

A. Near, toward the wall.

Q. As shown by this diagram here?

A. Yes.

Q. Now, if you raise the area where the water now accumulates, where would it accumulate then and stand?

A. All over, all over. In the track, in the path.

Q. All right, in the track and in the path.

A. Part of it goes out but it makes worse.

Q. Now, have you given any consideration to raising your track and road bed there?

A. Can't.

Q. You say you can't?

A. Don't got no clearance.

Q. You mean you don't have any clearance?

A. Between the track and bridge.

Q. Who owns that bridge?

Mr. Dudnik: Objection.

The Court: He may answer if he knows.

A. I don't know. It is not B & O property. It must be [fol. 512] either the City or the County. I imagine the City.

Q. Does it carry a public road?

A. Yes.

Q. Where automobiles travel?

A. Yes. It is not a railroad bridge.

Q. It is not a B & O bridge, all right. Was that bridge there, that same bridge there when you first took over the section of track?

A. Yes, yes.

Q. And that was back when?

A. February 1, 1921.

Q. So it was there before that. Now, have you given consideration, Mr. Delaria, to lowering this underground tile that goes up to the east this way to a manhole that is up in here somewhere?

A. I tried, but our drainage pipe I think is about approximately an inch or two higher than the drain pipe, the other, the one that takes the water. So if I lower we get the water back this other way.

Q. I will use this same diagram that I drew when Mr. Neff, an engineer called by the Plaintiff, was on the stand, and ask you to assume that this tile here is the one that leads away from this area under the bridge, that is, from the ditch which extends out there, and goes down, and this represents the manhole, and this represents the lead-off [fol. 513] pipe from the manhole down in this direction.

Now, is this what you are referring to, that is, these two pipes here?

A. That one into the other one.

Q. This one into that one?

A. The other one there.

Q. Well, this one comes from that direction?

A. Well, then it is that.

Q. Then it is this one?

A. Yes.

Q. Is that what you were just telling us about?

A. Yes.

Q. That there is just an inch or so there?

A. About an inch or so, between an inch or so higher than the other one.

Q. So if you drop this one down to here, let's say, then what would happen?

A. What would happen, the pipe gets plugged.

Q. You mean it backs up?

A. All the stuff stays in. It has no way to drain.

Q. Now, Mr. Delaria, how often would you say on the average that you or members of your crew are up in this area of the Columbus Road bridge in the course of your duties?

A. Well, pretty often. There isn't a week that we don't [fol. 514] do something about it, clean it up, brush it up a little.

Q. How often do you and your men come along this part of the track?

A. About every week.

Q. Every week or so?

A. Sometimes, the way it used to be in them days, I was there pretty near every day at that time.

Q. Well, I probably didn't clarify my question very much. Was there a change in this system some months ago?

A. Yes, they did.

Q. Within the past year or so?

A. May 1st.

Q. May 1st of 1959?

A. Yes.

Q. All right, let's take before that, then. Up to May 1, 1959, which would include the years '53, '54, and other years around there, about how often would you or your men be up in this area in the course of your work?

A. About every other day at least.

Q. About every other day?

A. Yes.

Q. Now, from your knowledge, Mr. Delaria, what can you tell us as to whether or not things tend to be thrown off this bridge which come down there on to your right-of-way?

A. I don't understand you.

[fol. 515] Q. Well, do people passing along the bridge sometimes throw things off and come down?

A. All along the bridge they do that.

Q. What kind of material is that?

A. Well, rubbish usually. Things like that. And as soon as we see that stuff, all them bridges they throw stuff out, we clean it up as we go along.

Q. In other words, there are more public bridges than this one right there in that area?

A. (Witness nods.)

Q. You still have to answer.

A. Yes, sir, below, east, out east they got about four, around four other bridges there.

Q. And papers, boxes and things like that come off?

A. Yes, they do that, they get rid of it.

Q. Now, when you or your men are up in the area, what if anything do you do about foreign material that has accumulated in through there, as well as other places along there?

A. Well, if it is paper, burn them up. If it is rubbish, if it is garbage, pardon my language, we usually bury it.

Mr. Dudnik: Bury it?

A. Bury it. Dig a little hole and bury it.

Q. If you find any dead animals or anything of that kind along there, what do you do with that?

A. We do the same thing, dig a hole and cover them up. [fol. 516] We don't have to dig the ditch. Dig it away from there.

Q. In other words, if you—

A. Take it away to a dry spot.

Q. From time to time do you do anything with this ditch that leads from this place under the bridge down to the drain tile?

A. What does that mean?

Q. Well, do you care for that in any way, the ditch?

A. Yes.

Q. What if anything do you do for that in the course of your work?

A. We clean it up.

Q. What do you mean by that?

A. If the stuff gets in the ditch—I don't get the—

Q. How do you maintain the ditch?

A. By cleaning it. Maybe some stuff got a little high spot, we lower that.

Q. By digging it out you mean?

A. Yes, digging it out.

Q. And what do you do in order to keep that drain tile open, so that water flows through, that is the drain tile that connects with the end of the ditch here and goes to the manhole?

A. Nothing to do there on the pipe unless it gets plugged. If it does get plugged, we run some, something to open it [fol. 517] up, something like that.

Q. A snake-like affair?

A. Sir?

Q. A snake-like affair, is that what you mean?

A. Yes.

Q. What if the opening is broken by debris of some kind, do you clean that out, too?

A. Yes.

Q. In other words, you service this area there as well as the rest of your track?

A. (Witness nods.)

Q. Now, it has been testified to here, Mr. Delaria, that Mr. Gallick, that is, Mr. Gallick says that he upon I believe one or two occasions, perhaps two occasions back sometime in 1954—I don't exactly know when, I don't think he knew for sure—let's assume sometime between the first of 1954 and August of 1954 he made complaints to you personally about dead rats and dead pigeons being along the track and beside the track in this area. Do you recall any such complaint from him?

A. No, sir.

Q. If such a complaint had been made do you believe that you would recall it?

A. Yes, I would.

Q. Have any of the men, any of the employees of the [fol. 518] Baltimore and Ohio, since you have been track foreman made any complaint to you about dead rats or dead pigeons or anything of that kind along the tracks or down in that area?

A. No, sir.

Q. Now, this particular place—we will get another picture here, I think this aerial photo will show—if I may use another of your exhibits, Mr. Dudnik. This is Exhibit 19.

Now, Paul, I don't know how well you can see that, but this red circle has in the center the Columbus Road bridge. Do you think you can pick that bridge out? This is an aerial view looking down, of course.

A. Where is Carter Bridge from there, so I get the location?

Q. Do you see the Carter Road Bridge here?

A. Yes, Carter—

The Court: Mr. Delaria, will you keep your voice up because the jurors on the other side have to hear you.

Q. Now, do you see your tracks coming up under the bridge and on up here to the Cuyahoga River?

A. Yes.

Q. Now, I am going to point to a building here which is right at the end of Carter Road Bridge. Do you see this building here?

A. That is the old depot.

Q. That is the old B & O depot building?

[fol. 519] A. Yes.

Q. Back on 1953 and '54, as well as other years around there, were there certain offices in that building?

A. Yes, there are yet.

Q. There are yet, what offices are there?

A. Well, they got Baltimore and Ohio downstairs. The Police Department upstairs. We got the operator, Medical Department. Then I think they rent the third floor.

Q. Then do you see this large building up here, it is in kind of a bow shape, can you tell us what that is, do you recognize that? I know this is hard.

A. Is the freight house, B & O freight house?

Q. Well, I think it is, yes. Does it look like it to you?

A. Yes.

Q. Now, going down here, coming back to Columbus Road bridge, do you see what appears to be a street or road going down here?

A. Lime Street.

Q. Is that Lime Street?

A. Yes.

Q. Is that a public street?

A. Yes.

Q. Now, let's follow that, if we may. Does that come off the end of Columbus Road bridge or down the ramp there?

A. Yes, yes.

[fol. 520] Q. Going down here under Carter Road bridge and on down does Lime Road continue on this way?

A. No, no—yes, yes.

Q. Where does it go?

A. Over there, that bridge. Then it gets on a little city bridge. It don't go all the way out, and turns into Canal Road.

Q. Does this Lime Street or Lime Road, whichever it is, lead down to Mau-Sherwood plant?

A. Mau-Sherwood and Sherwin-Williams.

Q. That is this one here?

A. Yes.

Q. And Sherwin-Williams is this one on down here?

A. Yes, and then it gets on the bridge.

Q. Do you see cars parked over here in this area?

A. Yes.

Q. Do those cars get down there by coming down Lime Road?

A. Yes.

Q. Now, do you see a lot of cars parked here, which is across the tracks here from Mau-Sherwood, do you see these?

A. Yes, yes.

Q. Can you tell us whose parking lot that is?

A. Sherwin-Williams.

Q. And is this their plant down here?

A. Both sides of the tracks.

[fol. 521] Q. Both sides, here and here?

A. Yes.

Q. Very well. Now, during the time that you have been section foreman have you received any complaints or notices or anything like that from any city officials or county officials or state officials concerning any alleged unsanitary conditions down there along your tracks?

A. No, sir, no, sir.

Q. When people use Lime Road here, does Lime Road show in this photograph, Exhibit 4?

A. That is Lime Road, yes.

Q. Is this Lime Road that I am running my finger along?

A. Yes.

Q. So about how close then does Lime Road, this public road, come to the area under Columbus Road bridge?

A. It is very close.

Q. About how many feet, can you give us an estimate?

A. Roughly it would be about 20 feet.

Q. Then does your track as it goes east here and Lime Road parallel each other for a distance?

A. Yes.

Q. And how close are they to each other when they are running parallel?

A. Well, you see, it is a narrow street there. Sometimes they drive right on the track.

[fol. 522] Q. Well, is it within a few feet of your tracks?

A. Right on top of it, some of these truck drivers—

Q. About 10 or 15 feet or so? I want to get some estimate here in the record.

A. You mean away from the track?

Q. Yes, how much distance between Lime Road and your track?

A. Well, in a distance of a hundred some feet you will have say about 10 feet distance. Then you get closer and you are right to the track.

Q. All right. For about a hundred feet, then, it is within 10 feet?

A. Maybe a little more than a hundred feet, something like that.

Q. And then east of that it gets still closer?

A. Yes, on account of the street is so narrow.

Mr. Leasure: You may cross-examine.

Cross examination of Paul Delaria.

By Mr. Dudnik:

Q. Mr. Delaria, you are still working for the railroad?

A. Yes, I do.

Q. When did you last see this—

A. When did I last what?

Q. When did you last see this area in Plaintiff's Exhibit 4, when did you last see it, sir?

A. Well, I saw that the other day.

[fol. 523] Q. When the other day?

A. A couple of days ago.

Q. A couple of days ago? Today is Thursday. Did you see it Monday?

A. Tuesday I think it was.

Q. The day before yesterday. When was the last time you saw it before that?

A. I was over one day about a week previous to that. But I can't recall the day.

Q. Well, is it fair to say then that you saw it two days ago, and about ten days ago?

A. That's right. No—yes, that's right, yes.

Q. Who was with you when you saw it two days ago?

A. The trackmen.

Q. Were you on the job then?

A. Yes.

Q. And who was with you when you saw it ten days ago?

A. Who was with me? A motor car, pushcar, and about three men. Went to west side, drove back and forth.

Q. Who were the men?

A. Well, the regular men I got.

Q. The men that work with you?

A. Yes.

Q. How did it look when you saw it two days ago?

A. Not very good.

[fol. 524] Q. What?

A. Not very good.

Q. Not very good?

A. No, sir.

Q. Slimy? Slimy?

A. Well, I don't know what you call slimy, what you mean, dirty?

Q. Did you see the green filth in the ditch going from the bridge down to the drain tile?

A. Yes.

Mr. Leasure: I think I will object to these descriptive adjectives such as debris and filth unless it is stated what he is really talking about.

Mr. Dudnik: If he doesn't know what I am talking about, he could ask me, your Honor.

Mr. Leasure: That may mean one thing to someone, and something else to another.

Mr. Dudnik: That is still a matter of redirect, your Honor.

Mr. Leasure: I object to the fact that he doesn't describe.

The Court: He may answer if he knows. If he doesn't know—

A. Can I explain—

[fol. 525] Q. No, I want to hear your answer, and then I will let you explain.

Mr. Leasure: I am still objecting, your Honor.

The Court: I will overrule the objection.

Mr. Leasure: All right, thank you.

Mr. Dudnik: Read me the question and the answer.

(Question and answer read by the reporter.)

Q. Now, you saw that the day before yesterday?

A. Yes.

Q. And you saw it ten days ago?

A. Yes.

Q. Did you see the water under the bridge?

A. I saw a little, yes.

Q. A little. Now, I believe that you said when you were shown this picture, this picture here, Exhibit No. 4, that there is a little water there.

The Court: Mr. Delaria, you can't nod your head because the reporter has to hear you.

A. Yes, yes.

Q. A little water there?

A. Yes.

Q. Now, I am going to show you another picture, and ask [fol. 526] you if from the second picture I show you it appears that there is more water than in the first picture? I am showing you Plaintiff's Exhibit No. 2. Now, will you take a look at that. Is there more water there from the appearance of the picture than there is in the first picture you were shown?

A. Well, I see spots here.

Q. Will you stand over here, then, Mr. Delaria, and we will all see it together.

(Witness steps down.)

Q. Will you point out to me and to the jury where are the spots of water that you see, where are the spots you are talking about?

A. Right through here. That is where it gets plugged up.

Q. What is here, sir?

A. You know why it got in that condition?

Q. No. I just asked you the question. The question was—

A. Why is it?

Q. No, not why. What is this, sir?

Mr. Leasure: Just a moment. The picture speaks for itself. There is no showing that this man was there when it was taken, that he has any more knowledge of this than is shown in the picture. I think it is an unfair method of cross-examination, and improper.

[fol. 527] Mr. Dudnik: He used the picture to illustrate.

Mr. Leasure: He didn't use this picture.

Mr. Dudnik: You used it.

Mr. Leasure: I used this one here.

The Court: It is an exhibit. It is part of the evidence. If the witness is familiar with the picture, he may testify what he sees on that picture.

Mr. Leasure: The point is, your Honor, he is not any more familiar with that picture than anyone in the court room. It speaks for itself, whatever it shows, on the date that it was taken.

The Court: What was the last question?

(Last question read by the reporter.)

Mr. Dudnik: The question is what does he see in that picture?

The Court: He may answer.

Q. The question I am asking, what is this, Mr. Delaria?

A. I never saw that condition.

Q. Mr. Delaria, that isn't my question.

Mr. Leasure: We will stipulate it is water, if that is [fol. 528] what you want.

Mr. Dudnik: Just a moment, sir. I am cross-examining a witness.

The Court: The court has ruled that this picture is in evidence, and that the question is a proper question. The witness may answer it to the best of his ability.

Q. Mr. Delaria—

Mr. Leasure: Just state what it is, that's all.

A. I don't know what it is. I never saw a place like that. I can't answer that.

Q. In other words, you now say you don't know what that is, is that your answer, Mr. Delaria?

A. Yes, in that shape what it is.

Q. No, no. Do you know what this picture shows? What is this?

Mr. Leasure: We will stipulate it is water.

Mr. Dudrik: No, I don't want you to stipulate, Mr. Leasure. Just a moment.

The Court: Let the witness answer.

A. It is a white spot to me, your Honor.

The Court: What is that?

A. It looks to me like a wet spot.

[fol. 529] The Court: It looks to him like a wet spot.

Q. White or wet?

A. White and wet, that's what it looks like. That's what the picture shows.

Q. Do you see water here?

A. I don't see no water. I see the picture. I see paper. I see white.

Q. You don't see any water there?

A. No.

Q. All right. You were looking at Plaintiff's Exhibit No. 2, were you not, sir?

(Witness resumed witness stand.)

A. What is that?

Q. Well, never mind. That is Plaintiff's Exhibit 2.

Mr. Delaria, do you remember that manhole, now, again, Plaintiff's Exhibit 4, along here, it doesn't show on this picture, there is a square manhole?

A. I know what you are talking about, yes, I do.

Q. That is under your work, jurisdiction, isn't it?

A. Yes.

Q. That is the B & O manhole, isn't it?

A. Yes.

Q. That's the one you work with, isn't it?

A. Yes.

[fol. 530] Q. And if it is plugged up it is your job to unplug it, isn't it?

A. Yes.

Q. Now, we will go back, Mr. Delaria, to this picture, and would you be kind enough to trace for me the entire area that you have to cover when you are working? Did you understand the question? If you can I would like you to trace the entire area that you have to cover on any day that you work, and if you will stand sideways, the jury will be in a position to see what you are doing, sir.

A. Where is Main Street here?

Q. What is your territory on your duty that you have to cover in a day?

A. I have no specification what I have to cover. I am the foreman. I go wherever I think it is necessary to go, unless we got something in particular that I got orders to go. Otherwise, it is my funeral.

Q. What I mean is this, you don't go to Berea, do you?

A. I don't go, no.

Q. You have a certain limit of territory that you cover as foreman?

A. But this here don't cover it.

Q. In other words, you still have more?

A. Oh, yes.

Q. How many miles do you have of railroad to cover?

[fol. 531] A. Well, before we had from—where the taxi cab is, at that particular time, up to cross Whiskey Island, and Pennsylvania, New York Central, right near the lake there, at that time.

Q. That was in '54?

A. Now different, now I got more.

Q. Now, going back to '54, in August, how many square miles, do you know what I am talking about, of territory

did you have to cover on your job, not that you went every day, but how much did you have to cover in your tour of duty?

Mr. Leasure: I think I will object to this. Just a moment, Mr. Delaria. He is asking for square miles. There has been no testimony that it is subject to square miles. On direct examination we have developed I think that we had about two miles of track. The square mile feature I think is improper in this instance, unfair.

The Court: He can describe as best he can the area that he had control and charge of.

A. It is not square, your Honor. It is long.

Q. How long?

The Court: Can you show?

A. Around a couple of miles. It was at that time. Now different. We got different setup, all the railroad has.

[fol. 532] Q. How many bridges did you have to go under and look under in connection with your work on your territory?

A. Under?

Q. Yes.

A. Well, comes first Carnegie Bridge.

Q. Where is the Carnegie Bridge?

A. On top of the B & O track.

Q. That is—

A. That is Carnegie, Carnegie goes to West Side.

Q. To Lorain Street, it connects up with Lorain Street?

A. Yes. Then we have Eagle Ramp, and then this one. But we got a lot of other bridges that go over—

Q. How many altogether, Mr. Delaria?

A. I don't know that. I would have to figure it out.

Q. Well, let me ask you. I don't want you to figure. I want an estimate. Thirty, twenty, forty?

A. No, not that many. I don't believe there is that many here in the city.

Q. How many would you say?

A. Well, Carnegie, Eagle Ramp, Columbus Road, and then we got Bridge 463, that is through Marvin Avenue.

That is not an overhead bridge. That is a new bridge that was built.

Then we have Main Street, that is way up. Then we have Bridge 464. That's all.

Q. How many men were in your crew to do this work [fol. 533] in '54 besides yourself?

A. You don't have no exact amount. It is not always the same. The railroad send me, you are allowed three men, so much time this month, and next month maybe they have a little more money to spend, well, I will have five. It all depends how much money they got to spend. All the railroads operate that way.

Q. It all depends how much money the railroad has, depending on how many men they use to keep the place clean?

A. That's right.

Q. Now, sir, there was just one crew on a shift, is that right?

A. Yes, that is plenty for that time.

Q. You are sure of that?

A. Oh, yes.

Q. Now, I don't mean to be fresh with you, Mr. Delaria, but you never had any engineering experience?

A. No, sir. But I don't hold no back seat on engineering stuff if it is railroad, another thing.

Q. But I mean you never studied engineering?

A. No.

Q. Did you when you removed the double track and made it a single track underneath Columbus Road Bridge, did you do that all on your own idea?

A. No.

[fol. 534] Q. How was that done?

A. We had engineers. I have supervisor, that is foreman of all foreman. And we have division engineer, and he has got a staff, you know, assistant. So we always plan our work.

Q. Did you then do this according to some scale or some drawings?

A. Yes. At that time we had this and the freight house together, combined.

Q. Then when you took this double track and made a

single track out of it, it was done according to engineering specifications?

A. Yes, it was.

Q. Then it wasn't done your own way? You were told how to do it?

A. I was told, and they want my idea, that's the way we work. They want my idea on what to plan, what you think about it.

Q. Did you—

Mr. Leasure: Let him answer.

Mr. Dudnik: I will, I am sorry.

A. If I have a suggestion they will take it, and, of course, if it is no good, they just scrap it, and say no, this is the right way. But a lot of times the man on the ground he gives good advice.

Q. And, Mr. Delaria, you found that when you took the [fol. 535] other track out, it left an area under the bridge like this, did it not?

A. No, sir.

Q. Well, let's forget about the water that is in there. Did it leave an area which was lower than the ground along here?

A. You want my answer on that just the way we did it?

Q. No, we will come to that. My question is after you concluded your work, when was that, in 1951 or '52?

A. Something like that, right along there.

Q. You then found that after it was all done and you had one track, two rails, you had an area in here which I am pointing to—do you follow me?—which was lower than the area alongside of it?

A. I didn't get the track, didn't get that far. It was closer to this one and we moved it this way.

Q. You mean the track was originally closer to this thing?

A. Closer.

Q. Now, my question is when you are all finished, here you are, this is all finished—right?

A. Yes.

Q. —when it is all finished, no matter how the track was

before, when it was all done you have here an area, a place which was lower than here, is that right?

A. It is lower? Well, yes—

[fol. 536] Q. That is my question.

A. But we didn't leave that condition there that way.

Q. No, you wouldn't leave that condition that way, that is a bad condition there, isn't it?

Mr. Leasure: I object to that, your Honor, the characteristics. The exhibit speaks for itself.

The Court: The witness said, "We didn't leave that condition there like that," and I think Mr. Dudnik—

A. What we did, we lowered all the mud, all the stuff, we had bulldozer there, we had quite a bit of equipment, we load that stuff, we unload slag, we even dug under this track and put slag all over, put slag right alongside, all fresh stuff. Now—it is not now.

Q. Now it is down?

A. I hope it would go down a little more, the tracks, we get a little more clearance. Get a little more clearance.

Q. And a few more rats?

Mr. Leasure: Just a minute. Let's be fair, Mr. Dudnik.

The Court: That question will go out.

Q. Is it down now, Mr. Delaria?

Mr. Leasure: I object to that.

[fol. 537] A. The same grade.

Mr. Leasure: Unless he says what he means by down.

Mr. Dudnik: He knows what I mean. It is his words, your Honor.

The Court: Mr. Dudnik pointed to the area with his glasses there, the spot. Do you understand the question, Mr. Delaria?

A. Yes.

Q. Is it down now today?

A. It isn't down, because you have to have that grade. It isn't down. You can't go down.

Q. No, my question is this—

A. It is the same grade, got to keep the same grade.

Mr. Leasure: He answered the question and now Mr. Dudnik says no, no. I am objecting to that.

Mr. Dudnik: I won't say no. All right.

Q. Mr. Delaria, what I want to know, when you saw the place the day before yesterday, was the ground which I am circling with my hand lower than the ground which I am circling with my hand to the right of it?

A. The way we usually have it, it is not lower or higher, the way we usually have it.

[fol. 538] Mr. Dudnik: I ask that the way we usually have it be stricken, your Honor.

The Court: Mr. Delaria, you can answer that yes or no.

A. Your Honor, I can't answer because I didn't dig it down there. It would be lower if somebody dug it out, but if nobody touch it, it wouldn't have been lower. It could be higher, if you ask me, but it wouldn't be lower because nobody dug it out. How can it get lower? Unless it gets away from the bottom I can understand. That's why I can't answer yes or no. It is lower, I can't answer lower, because nobody dug it out.

Q. Now, if you don't understand my question, I will ask it in another way, Mr. Delaria.

A. Yes.

Q. You were there the day before yesterday, is that right?

A. Yes.

Q. Did it then look like it does on this picture?

A. No.

Q. But you saw it the day before yesterday, did you not? Did you see some water in here the day before yesterday?

A. Toward the wall, yes.

Q. Did you see it in this area where I am pointing?

A. I didn't see any water there.

Q. Now, will you then come down, please, and show the [fol. 539] jury with your hand, outline where the water was when you saw it the day before yesterday?

A. It was in this direction wet.

Q. All right, now, how was it—

Mr. Leasure: Let him answer.

A. A couple of inches water here, and there was a little spot here. But I don't see all this mess here on this picture.

Q. How was it ten days ago?

A. Ten days ago it was better.

Q. Better than that yet?

A. Yes.

Q. So that ten days ago there wasn't even a little bit of water there?

A. There was a little bit of water, but not—

Q. But less than you described a moment ago?

A. Yes, two days ago, yes.

Q. Was that drain—the big manhole thing, we call it a drain, the one with the cover on?

A. Yes.

Q. Was that plugged ten days ago?

A. No, sir.

Q. Was it plugged two days ago?

A. No, sir. It is not plugged yet.

Q. And it hasn't been?

A. I hope it isn't.

[fol. 540] Q. Has it been plugged in the last two months?

A. To tell you the truth, it didn't need much attention on that plug as much as it did on that, because there is not much stuff goes in there. Once in a while I raise it, and I don't see any use cleaning.

Q. Is it fair to say that for the last two months it needed no cleaning, is that a fair statement?

A. Not in the manhole, but it needed a little cleaning once in a while on the ditch.

Q. On this ditch?

A. Yes, sir, once in a while you got—

Q. I am sorry. In the last two months that manhole needed, none of these pipes, those three pipes which Mr. Leasure drew for you, needed cleaning, they were not plugged?

A. Yes, and now today somebody has gone over maybe look the things over, see if there is anything, find anything, but I am pretty sure in that manhole there is nothing to get out.

Q. And hasn't been for two months?

A. No, sir.

Q. All those pipes leading from the manhole, are they B & O pipes?

Mr. Leasure: What was the question? I didn't hear it. You have your back to me.

Mr. Dudnik: Are all those pipes leading from the man-[fol. 541] hole B & O pipes.

A. I don't know.

Q. You don't know?

A. No.

Q. How about the drain tile, has that been cleaned the last couple days when you were there two days ago?

A. We take care of them every time we have a heavy rain.

Q. I am talking about the drain tile which goes from here down.

A. Yes.

Q. Has that been cleaned?

A. No. When you clean them, you either have to take them out or—

Q. Did you have to clean them in the last two months?

A. No, sir.

Q. It has been in good shape the last two months?

A. Well, fairly good shape. I wouldn't say very excellent.

Q. Well, was it plugged up?

A. No. It would be a half-inch, it could be a thing like that, but not plug up.

Mr. Dudnik: I didn't hear the answer, could be what?

A. Could be a half-inch of stuff runs in there, or a thing like that, because, you know how ditches are.

Q. But not plugged up?

[fol. 542] A. Not plugged up.

Q. And no water, you would have no trouble getting the water through?

A. We had trouble, we always had a little trouble getting water through.

Q. Why was that, Mr. Delaria, that you had trouble?

A. Well, because of the condition of that bridge. Nothing I can do. I can't raise the bridge. I can't lower the

track, and the way I figure get the water through the other way, and the engineer told me if you do that you will have rest this way—

Mr. Leasure: You are not permitted to say what somebody else told you, Mr. Delaria.

Q. Mr. Delaria, do I understand, then, that you know of no engineering methods by which you could cut out or eliminate the accumulation of water in this area where I have run my hand, is that right?

A. I didn't get that, engineering what?

Q. Well, you know of no way that any engineer can make a plan—I am going to try and make it easy for you to understand me—can make a plan or do something to raise this area, so that it would run, the water would run, all the water would run into the drain tile? Did you understand my question?

A. Yes, I understand your question. I don't have engineer [fol. 543] experience, but I am well aware of anything to be done on the railroad. I don't believe an engineer got anything over—

Q. Over on you?

A. That's right, if it is for track work. Now, if I got to do something else, I am lost.

Q. But on this stuff you don't take a back seat for any engineer?

A. The engineer, they come over there, they study the situation, they see things. I see engineer over there several times, B & O, look around. Well, that's the best position the way it can be done.

Q. Then I take it I made a fair statement to you, you know what I am saying when I am saying I make a fair statement, that there is no way that you know, and you feel you wouldn't take a back seat for any engineer on this proposition, so that there is no way that you know or any engineer would know, how to eliminate the water from this area completely, is that right?

A. Under the circumstances.

Q. Under the circumstances?

A. Yes.

Q. Mr. Delaria, the drain tile doesn't show on this pic-

ture, Exhibit 2, does it, the drain tile, that is farther this way, isn't it?

A. That way.

[fol. 544] Q. In this area where you saw whatever you said you saw, lower than the drain tile?

A. I would say it is about level.

Q. About level?

A. About level.

Q. Do you know Mr. Clason? He is a switchman?

A. Maybe I know his face. I don't know the name.

Q. I was going to ask you if Mr. Clason ever complained to you about this condition, but as long as you said nobody complained to you, so Mr. Clason couldn't have done it either, could he?

A. Who is Mr. Clason?

Q. One of the switchmen that worked on the number 2 job.

A. What the complaint was? So I try to recall.

Q. About the conditions under the bridge. Well, I will withdraw that.

A. One time, I don't know who did it, was telling me that walking he gets dirty, so I made a nice path where they could walk away from the ditch.

Q. Who was that?

A. I don't know, that is a long time ago.

Q. Nobody complained—

A. Well, that guy did, but not complained about anything else.

Q. Nothing else?

[fol. 545] A. Every day you find somebody complains about something, you know how it is, along the road, maybe see something here, something there, and we must correct those things as much as we can.

Q. How many complaints that you say did you have about any conditions under the Columbus bridge, just one?

A. Ain't nobody walks over there. That is why there is no complaint.

Q. You mean nobody walks there?

A. No. At night they walk right close to the track, right close to the track when they switch the freight house. Outside of that is no other walking there. They ride.

Q. Don't switchmen in their work walk under this bridge?

A. They don't work there, only at night when they switch the freight house, a little while, and then walk right close to the cars.

Q. Let me understand—excuse me, I want to let you finish—are you finished?

A. Yes, sir.

Q. Let me understand you, I want to be sure. No switchmen or brakemen walk under that bridge one way or the other?

A. This other side.

Mr. Leasure: Just a moment.

The Court: He may ask the question again, go ahead.

[fol. 346] A. This other side, the high side.

Q. You mean they walk on this side?

A. Yes.

Q. Away from the ditch, is that what you mean?

A. Because they go switch West Street on that end. They got no reason to walk over here. Only the car inspector at night, and maybe a brakeman couple up the cars, right close to the track.

Q. Real close to the track, is that it?

A. Yes.

Q. And, of course, this side is always dry?

A. Yes, that side, what do you mean? Yes, well, it is dry, it is dry

Q. Thank you, thank you very much, Mr. Delaria. I appreciate your coming down. That is all, thank you.

The Court: You may step down, Mr. Delaria, and go back to work.

The Court: Ladies and Gentlemen of the jury, we will have a short recess at this time. You will return to the jury room with the admonition that you do not talk about this case to anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

Mr. Leasure: Mr. Clason, please.

[fol. 547] Thereupon the Defendant, further to maintain the issues on its part to be maintained, called as a witness WILLIAM CLASON, who, being first duly sworn, was examined and testified as follows:

Direct examination of William Clason:

By Mr. Leasure:

Q. Will you state your name, please?
A. William Clason.
Q. Where do you live?
A. 10918 St. Mark Avenue.
Q. Are you employed by the Baltimore and Ohio Railroad?
A. Yes, I am.
Q. Are you the same Mr. Clason who testified here in this case last week?
A. Yes, I did.
Q. In what capacity are you employed by the Baltimore and Ohio at the present time?
A. Yard foreman on the west end.
Q. On West Avenue?
A. West end yard.
Q. Is that part of the Clark Avenue yard?
A. Yes, the west end of the Clark Avenue yard.
Q. Now, back in 1953 and 1954, in that general period of time, were you also employed by the Baltimore and Ohio Railroad Company?
[fol. 548] A. Yes, I was.
Q. And in what capacity?
A. Well, both as a yard foreman and brakeman.
Q. What job or jobs were you working on at that time?
A. What is down as the downtown job or run number 2.
Q. Is that the same job Mr. Gallick was working on in that period of time?
A. Yes, it was.
Q. And did you work with Mr. Gallick from time to time?
A. Yes, I did.
Q. On that job?
A. Yes.

Q. Now, Mr. Clason, I have asked you to come back here so that we can get the benefit of your knowledge pertaining to this case. Do you recall when you were here before you were asked certain questions by Mr. Dudnik?

A. Yes.

Q. Do you recall that I at that time didn't ask you any questions?

A. Yes.

Q. I want to find out what you have to tell us in your own words concerning the subjects inquired about by Mr. Dudnik. He asked you whether there was a swamp existing under the Columbus Road bridge back in 1953 and '54, and I think you answered yes.

[fol. 549] Now, if you were using your own language, how would you describe the condition that existed under that bridge at that time?

Mr. Dudnik: There is an objection for this reason, your Honor. The witness has a right, and I think Mr. Leasure has a right to ask him the questions, but not in the form—the form of that question is objectionable, if you were using your own language. He used his own language before.

I think Mr. Leasures has a right to ask him questions, but the form is improper and therefore I object.

The Court: This is now direct examination of this witness. Of course Mr. Leasure may ask any questions that are proper, and I think you might rephrase the question.

Mr. Leasure: If your Honor please, this man was not permitted to use his own language before. He was forced to answer yes or no to language used by Mr. Dudnik.

Mr. Dudnik: I ask that the jury be instructed to disregard the statement of Mr. Leasure.

The Court: The jury will disregard the statement made by Mr. Leasure, and I think Mr. Leasure you may pro-[fol. 550] ceed as though under direct examination, as though this witness was called here for the first time as the Defendant's witness.

Mr. Leasure: You mean, your Honor, I cannot take cognizance of the questions and answers given by this witness previously?

The Court: You sure may take cognizance of it. But you will have to treat this witness as a witness called by the Defendant under direct examination.

Mr. Leasure: I am objecting to the fact that we are required to do that, but I will proceed accordingly.

The Court: Overruled.

Q. Now, Mr. Clason, will you in your own words describe for us the condition that existed under Columbus Road bridge in so far as any water was concerned there back in 1953 and '54 when you were working there on the downtown job?

A. Well, there is, there was a puddle of water there, normally one to two inches deep. But as much as a foot deep during a heavy rain or a flood.

Q. Then after a heavy rain was finished what would happen to that approximate foot of water?

A. Well, it would drain down eventually. During the flood the drain would be plugged up with papers and sticks and tin cans and things.

[fol. 551] Q. Have you yourself observed who if anyone would clean out the accumulation of sticks and paper which would wash down following a rain?

A. Well, I have seen the section boss' men clean it out from time to time after a rain.

Q. Then as soon as they cleaned it out what would happen to the water?

A. It would drain down.

Q. Now, as long as there was not a heavy rain which would wash this material down, what would be the condition of the water under the bridge, how would you describe that?

A. Well, I would describe it as just a puddle of water, that's what it was.

Q. Have you observed where the water comes from that runs down under the bridge there, the Columbus Road bridge?

A. Yes. When it rains it comes down the bank, but a great deal of it comes off the other bridges. The drain pipes on the bridge are broken at the bottom.

Q. What bridge or bridges are you referring to when you say the drain pipe is broken?

A. Both the Superior-High Level Bridge and the Cleveland Union Terminal Railroad bridge.

Q. So we can have an understanding, can you see this, Mr. Clason?

A. Yes, I can.

[fol. 552] Q. Assume that this is the Columbus Road bridge here where I have my pencil, in the center of this red circle, am I now pointing to the Detroit-Superior-High Level Bridge that you just referred to?

A. Yes.

Q. Am I now pointing to—what bridge is this?

A. Well, we call it the Cleveland Union Terminal. I guess it belongs to the New York Central, I am not sure. It is a railroad bridge.

Q. It is a railroad bridge. Is it a B & O bridge?

A. No, it isn't.

Q. Now, where is the broken pipe, is it on this bridge here?

A. On both of those bridges. There are piers—

Q. Here and here?

A. There are piers under the bridge on each side of the B & O tracks, and the pipes extend down along the piers, but they do not enter into a drain, or if they did the bottoms of the pipes are broken off and the water runs off on the ground and down the ditch along the B & O track.

Q. Then does it come in this direction?

A. Yes, it does.

Q. That would be easterly, in railroad directions?

A. Yes.

Q. And down to under the Columbus Road bridge?

A. That's right.

[fol. 553] Mr. Dudnik: Your Honor, I think this is important material and he shouldn't testify for the witness. Objection.

The Court: Counsel will refrain from leading questions.

Q. Then will you tell us, let's take the water that comes down from the Big Four bridge here, from Cleveland Union Terminal, which direction does that water go once it reaches the ground?

A. It flows eastward toward the Columbus Road bridge.

Q. As I am moving my pencil?

A. In that direction, yes.

Q. And then where does it go from there?

A. Well, there is a drain there and it goes into that drain.

Q. You mean an underground drain?

A. Yes.

Q. And which direction is that from Columbus Road bridge, that drain which you just referred to?

A. It also leads eastward.

Q. It leads eastward?

A. Yes.

Q. Now, Mr. Clason, you were asked by Mr. Dudnik about whether you had seen attempts of Mr. Delaria's crew to clean up this area under the bridge.

Do you recall that question?

[fol. 554] A. Yes, I believe so.

Q. And you answered yes. Will you tell us what you meant by that answer, please?

A. Well, I meant that he does from time to time have his men go down there and clean up under the bridge. I know they take our blocks every day that we use to block cars with, we have to hide them in the grass.

Q. You mean that you operating men lay blocks somewhere?

A. We use blocks when we are switching the house, we use them to hold the cars, it is downgrade, it is a hill there eastward, and when we kick cars back into the house we use a block to hold them.

Q. Is that a wooden block?

A. Wooden block. Usually a 2 x 4.

Q. All right, and what do you say happens to those?

A. When they clean up around there they pick them all up.

Q. Now, my question relates more to the Columbus Road bridge area; will you tell us what you meant in your own words when you said that you had seen Mr. Delaria's crew clean up the area or try to clean up the area under the bridge?

A. He has to clean that up because people throw garbage and tin cans and stuff off the bridge down on the right-of-way and into the ditch. When there is a heavy rain

it washes it down into the drain and it plugs it up so they have to clean that out of there to get the water out.

[fol. 555] Q. Now, Mr. Clason, you were also asked about conditions relating to dead pigeons, dead rats, insects, and so forth, under the bridge and in that area.

Will you tell us in your own words what you have observed, and this goes back to 1953 and 1954 now, as to any such conditions either under the Columbus Road bridge or in that immediate area?

A. Well, at that time I might have seen two or three dead pigeons over a period of time under the Columbus Road bridge and a dead rat.

Q. Back in 1953 and '54, were there times, days, occasions when you were there that you would see no dead pigeons under or near Columbus Road bridge?

A. That's right, there were.

Q. And some days there would be as high as how many?

A. Well, I don't think I have seen three dead pigeons all at the same time.

Q. Now, what area are we talking about? I have asked you about Columbus Road bridge and that immediate area. What area do you have in mind when you have answered the question?

A. Well, I would say approximately a hundred feet each way of the Columbus Road bridge.

Q. Would that take it down under Carter Road bridge?

A. Yes.

Q. Now, tell us in your own words what you had observed [fol. 556] back in 1953 and '54 as to any dead rats in that same area?

A. Well, there has been, there was a dead rat under the Columbus Road bridge about that time, I remember seeing that.

Mr. Dudnik: May I have that answer read? Excuse me, Mr. Clason.

(Last answer was read by the reporter.)

Mr. Dudnik: A dead rat, that is all I am interested in.

Q. Was there one or more than one on any one occasion, Mr. Clason?

A. Well, there was more than one. There was two, but under that Columbus Road bridge at any particular time I only saw one.

Q. Are you telling us that there was one time when you saw two in the area that we are talking about?

A. Yes, but not at the same time.

Q. Not at the same time?

A. No.

Q. Will you give us some idea of how long a period of time would pass by back in 1953 or 1954 when you would not see a dead rat at all in this area?

A. Well, I would say probably five or six months.

Q. In other words, you are telling us that five or six months might go by without seeing a dead rat in this area?

A. That's right.

[fol. 557] Q. Then upon occasion you would see one or two I think you indicated?

A. Yes.

Q. But not two at the same time?

A. No.

Q. Now, on the subject of insects, will you tell us in your own words what you have observed relative to any insects either under Columbus Road bridge or the immediate area as compared to elsewhere in the flats area generally?

A. Well, I haven't seen any different insects there than anywhere else, in the flats or in the city for that matter.

Q. Do you recall having seen any particular type or types of insects either under the Columbus Road bridge or close by?

A. Well, I could hardly name them. I don't know. I don't know insects that well. I have seen—

Q. Will you just tell us in your own words what ones you have seen there, and this relates again back in 1953 and 1954, describe them as best you can.

A. Well, I would say there was ants and sand fleas, and Canadian soldiers and mosquitoes and flies. I have never seen any extraordinary bugs.

Q. Will you tell us whether or not you have seen any greater accumulation or numbers of any such insects there

under or near Columbus Road bridge than you would see generally in the flats area at the same time?

[fol. 558] A. Well, the only greater accumulation of one particular type of insect would be when we get the New York Central transfer off Whiskey Island, there are millions of sand fleas over there.

Other than that, I wouldn't say they would be any different than anywhere else.

Q. By Whiskey Island, is that the island that is up on the edge of Lake Erie?

A. That's right.

Q. And by New York Central transfer coming down, what do you mean?

A. On the New York Central Railroad they have a set of tracks there that they deliver cars for the B & O. We also deliver cars for the New York Central. And that set of tracks we call a transfer.

Q. Is that an interchange point between the New York Central and the B & O?

A. That's right.

Q. Do I understand you to say that on occasion when you get a transfer from the New York Central, there would be sand fleas?

A. Yes.

Q. What do you mean by sand fleas? I am not sure I know what one is.

A. I don't either.

Q. Is there any way you can describe it as to size and [fol. 559] appearance?

A. Well, they are a fuzzy little insect.

Mr. Dudnik: Pudgy?

A. Fuzzy.

Mr. Dudnik: Oh, fuzzy.

A. Yes. They have wings. They fly. The wind blows them in off the lake when it is warm, and there is a great number of them that come.

They are similar to Canadian soldiers but not near so large. They are about as big as a fly.

Q. Do they seem to be there at one particular time of the year more than some other?

A. Yes, this time of the year.

Q. This time of the year, you mean June?

A. June and July.

Q. How long did you work on this downtown job, Mr. Clason, back in that period of 1953 and 1954?

A. Well, I worked off and on for the ten years previous to that, but just at that time in '53 I had been there since, well, a little over a year. I don't know exactly, but a little over a year.

Q. And have you worked down there off and on since that time?

A. I worked there five consecutive years, from '53 until last December of '58.

Q. I see, five years on the downtown job?

[fol. 560] A. Yes, sir.

Q. Consecutively?

A. Yes.

Q. Now, at any time that you have been working on the downtown job, have you been bitten by any insect either under or near the Columbus Road bridge?

A. Well, yes, if mosquitoes are insects, I have had mosquito bites.

Q. Except for mosquito bites have you ever had any insect bites in that area?

A. No.

Q. Do you know of any other B & O employee during the time you were down there who suffered any insect bite in that area other than perhaps a mosquito bite?

A. No, I don't.

Q. Would you say that you have suffered any more mosquito bites down there than you get around home or at other places?

A. No.

Q. Mr. Clason, if I can impose upon you to do something for me, does the Baltimore and Ohio Railroad Company have what are known as safety rules?

A. Yes, they have.

Q. And as an operating employee, are you familiar with those?

A. Well, we also have operating rules. I am familiar with both the safety and operating rules, but I can't quote [fol. 561] them word for word.

Q. Well, I won't call on you to do that. But what is the fact as to whether or not B & O employees are required in their job to be conversant with the safety and operating rules of the company?

A. Yes, it is.

Q. They are so required?

A. Yes, they are.

Q. If I may hand you a book entitled Safety Rules, and ask you to turn Safety Rule No. 1, will you look at that and see if that is Safety Rule No. 1 of the Baltimore and Ohio?

A. Yes, it is.

Q. Will you read it to us, please?

Mr. Dudnik: May I see it?

Mr. Leasure: Oh, sure. I thought you knew all those rules.

Mr. Dudnik: I don't represent railroads; you do.

Mr. Leasure: You have seen enough.

Mr. Dudnik: Is this the one?

Mr. Leasure: Yes.

Q. Will you read it into the record, please?

A. (Reading) "When physically able to do so, employe sustaining injury no matter how minor will report it to the supervisor before leaving company premises."

[fol. 562] Q. Will you tell us, Mr. Clason, whether the Baltimore and Ohio has a particular form that is used by the employees to report accidents and any injuries?

A. Yes, they have. It is a form we call—it is known as 790. That is the form number, and it is a personal injury report form.

Q. What can you tell us, Mr. Clason, from your own knowledge and experience during the time that you worked on the downtown job as to what if any close clearance there was at Columbus Road bridge?

A. Well, there is very close clearance under the Columbus Road bridge on boxcars, particularly 50-foot boxcars,

because the car is 15 foot 6 inches, something like that, 15 5½ or 6 inches, and then if it happens to have a staff brake it will extend up another 18 inches.

So that there isn't much more than, well, there isn't any more than 3 inches between the top of the brake and the bottom of the bridge, and from the running board it wouldn't be more than—it would be less than 2 feet.

Q. You say on such a car there would be about a 3-inch clearance between the topmost part of the car and the bottom of Columbus Road bridge?

A. That's right.

Q. As those tracks now exist there?

A. Yes, sir.

[fol. 563] Q. And as they existed at the time you were on the job from 1953 to 1958?

A. That's right.

Mr. Leasure: You may cross-examine.

Cross examination of William Clason.

By Mr. Dudnik:

Q. Mr. Clason, you talked with me about this case in my office?

A. That's right.

Q. And before that did you talk to—rather, before you testified the other day did you talk to any of the gentlemen representing the B & O Railroad?

A. About the case?

Q. Yes.

A. No, I didn't.

Q. Were you up in any of their offices?

A. Before I testified? When you called me?

Q. Yes.

A. No, I wasn't.

Q. And had you given a statement before you testified, to the Claim Agent?

A. Yes, I did, but that was quite a while ago.

Q. After you testified here were you summoned to the offices of the Claim Agent?

[fol. 564] A. After I testified here for you?
Q. For me.
A. Yes, I was.
Q. Where did you go?
A. In the Union Commerce Building, Room 1956.
Q. Baker, Hostetler, and Patterson's office?
A. Yes.
Q. Who was there when you got there that you knew?
A. Well, I didn't know anyone there.
Q. Well, you saw the Claim Agent there, didn't you?
A. I met him there.
Q. Who was he?
A. Pat Glenn.
Q. Pat Glenn. Anyone else?
A. Mr.—
Q. Leasure?
A. Yes, and—
Q. These two gentlemen?
A. Yes.
Q. Anyone else?
A. No, that's all.
Q. What other B & O employees did you see there?
A. Oh, Walter Rady.
Q. Walter Rady is the man who testified the other day?
A. Yes.
[fol. 565] Q. Who else did you see there?
A. Molnar.
Q. Mr. Molnar?
A. Yes.
Q. Who else did you see there?
A. That's all.
Q. Just those two men?
A. Yes, sir.
Q. Then you were read the testimony which you gave in court, were you not?
A. Part of it, yes.
Q. You were shown a transcript of what you testified to, were you not?
A. Part of it, yes.
Q. Now, you say the water comes down, comes up around here and goes down, flows down this way, is that right?

A. Yes. It flows eastward along the—in the ditch along the B & O track.

Q. And that is because the bridge is defective or the pipes in the bridge are defective?

Mr. Leasure: I think I will object to the word defective. That is a conclusion.

The Court: I think he testified they were broken.

Mr. Dudnik: Is broken the same as defective?

[fol. 566] Q. Is it because they were broken?

A. Yes, it is because they were broken.

Q. And that is the City of Cleveland pipes that were broken?

A. I don't know who maintains them. I presume the city does.

Q. Then you said the New York Central pipes were broken?

A. Yes, they are.

Q. No B & O pipes were broken that you know of?

A. We don't have any pipes along there, I mean, we don't have any bridge along there.

Q. So all this water flowed, and all flowed toward this Columbus Road bridge, is that right?

A. That's right.

Q. Then after the water flowed, and the weather was nice, everything was nice and clear all over, was it not, and dry?

A. Well, it wasn't dry under the Columbus Road bridge.

Q. That's the only place it remained wet, isn't it, Mr. Clason?

A. Yes, it was a puddle of water.

Q. Under the Columbus Road bridge, wasn't it?

A. Yes.

Q. And it stayed wet, didn't it?

A. Yes.

[fol. 567] Q. And stayed wet and stayed wet, didn't it, sir?

A. Yes.

Q. Now, you read us the rule book, the rule. Mr. Clason, had you ever fallen while at work?

A. Oh, yes, lots of times.

Q. And received minor injuries?
A. I wouldn't say injuries. I received abrasions.
Q. Would you call an abrasion a minor injury?
A. Well, it might be pretty minor, yes.
Q. Well it is a minor injury, isn't it?
A. Yes.
Q. Did you report that to the Claim Agent?
A. No.
Q. You have had many minor injuries that you didn't report to the Claim Department, haven't you?
A. Oh, yes.
Q. So did the other men?

Mr. Leasure: I will object to that.
The Court: He may answer if he knows.

Q. Do you know?
A. I don't definitely know. I presume they did.
Q. And have you heard of men who sustained minor injuries which later became serious which they then reported to the railroad?
[fol. 568] A. I wouldn't know about that.
Q. You don't know of any such instance, I take it?
A. There could be. I don't personally know of any such instance.
Q. You say there could be but you don't personally know?
A. No.
Q. Now, you heard of no other employee who suffered a bite under the bridge?
A. No.
Q. Did Mr. Molnar—do you know about Mr. Molnar's experience with a bug or insect under that bridge?
A. Yes.
Q. You know about that?
A. Yes.
Q. And you know that a bug of some kind crawled over his neck, don't you?
A. No, I don't know that it was a bug. He said it was.
Q. Then it clamped his thumb, didn't it?
A. That is what he said.

Q. You know about that?
A. I know that he said that.
Q. Well, you weren't there?
A. Yes, I was there.
Q. Did he tell you that?
A. What?
[fol. 569] Q. When you were there?
A. Can I explain it?
Q. Sure.
A. Well, we were riding on the footboard of the back of an engine, him and I, and I saw him raise his hand and go like that on the back of his neck.
Q. That was under the Columbus Road bridge, wasn't it?
A. It was along the River Track east of the Columbus Road bridge, between Columbus Road bridge and Sherwin-Williams.
Q. It was not under the bridge?
A. No.
Q. You are sure of that?
A. Yes.
Q. All right, go ahead and tell me what happened.
A. Well, oh, he said—I was on the outside and the engineer wasn't looking back at us because we were making a movement from point to point.
So he wanted to stop, and so I put the air on the engine and we stopped, and he got out and we both looked for he said a bug was on the back of his neck and stuck on his thumb and he threw it away.
Q. You remember that incident?
A. And it was at night.
Q. You remember that incident, do you not?
A. Yes, and we looked around the right-of-way there [fol. 570] with our lanterns but we didn't see anything and I didn't see any bug.
Q. He told you it was because of Jim Gallick's experience, didn't he, do you remember that?
A. No, I do not remember that.
Q. You were in, you were riding an engine?
A. Yes.

Q. And were you going east?

A. East.

Q. Show me which east would be on this picture, Plaintiff's Exhibit 4?

A. Well, that's west, and east is coming this way.

Q. Fine. So I can show the jury, you were riding an engine which was coming from west to east, as you say it?

A. That's right.

Q. Under the bridge?

A. That's right.

Q. Now, then, I take it that you are a truthful man, Mr. Clason?

A. I am trying my best to be. After all, this goes back six years almost, and it is difficult to remember such details as you require.

Q. As time goes on details escape you more and more, do they not?

A. That's right.

[fol. 571] Q. You would remember facts of an accident five years ago, you would remember them better three years ago, than you would today, would you not?

A. Yes.

Q. Did you ever intend to not tell the truth about this case?

A. No. No, I do not intend to.

Q. At no time did you ever intend to mistake, did you, Mr. Clason?

A. No, I do not.

Q. Nor did you ever before?

A. Not to my knowledge.

Q. Certainly. Now, I am going to hand you—

(Plaintiff's Exhibit 23-A, 23-B, and 23-C were marked for identification by the reporter.)

Mr. Leasure: May I see it, please?

Mr. Dudnik: Yes, you may.

Q. I am going to hand you a paper that has been marked Plaintiff's Exhibit 23-A, 23-B, and 23-C. First I want you to read the name on this sheet. Withdraw that. Read the name written along the side of this sheet.

A. The name is William Clason.

Q. Is that your signature?

A. That is my signature.

Q. Did you write that, sir?

[fol. 572] A. I wrote it.

Q. That is on Exhibit 23-A. Now, I hand you 23-B, and ask you to read the name along the side of that sheet?

A. That is the same name, William Clason.

Q. Did you write that, sir?

A. I wrote it.

Q. Now, I am going to hand you Plaintiff's Exhibit 23-C, and read the last line at the bottom of this.

A. The last line reads "I have read this and it is true, William Clason."

Q. Did you write that, sir?

A. Yes, I wrote it.

Q. And did you sign it, sir?

A. I signed it.

Q. You read it, didn't you?

A. Yes.

Q. And you were telling the truth then, weren't you?

A. I believe to be.

Q. And it was taken from you some two years ago, wasn't it?

A. I don't know just when. About that time.

Q. About two years ago. A gentleman came out and asked you to tell him what you knew about Mr. Gallick, didn't he?

A. Yes, he came out and wanted a statement as to the conditions that we are speaking of under the Columbus Road bridge.

[fol. 573] Q. Now, I am going to read it and you follow me as I read it.

(Reading) "My name is William Clason. I live at 10918 St. Mark Avenue. I have been living at this address for the past 12 years. My phone number is Clearwater 1-3397. I am employed as a brakeman for the B & O Railroad for the past 11½ years."

Did you read that with me?

A. Yes.

Q. And it is plain to read?

A. Yes.

Q. You have no trouble reading it?

A. No.

Q. "James Gallick and I worked together off and on for about ten years. Back in August, the early part, of 1954, we were working what is called the downtown area. It was about this period of time that he had bid in for a west end job."

Did you read that?

A. Yes.

Q. So far it is the truth, isn't it?

A. Yes.

Q. "After he was gone for about two weeks a Claim Agent for the railroad came over and said he wanted a statement from me in relation to James Gallick as he had been bitten by an insect while he was working the downtown area."

Two years ago was that your recollection of the truth, [fol. 574] sir?

A. Well, I recall then two years ago that it may have been more than two weeks, but we put in two weeks as a happy medium, because I didn't know for sure just when it was and I still don't know.

Q. That was a close guess I presume?

A. Yes.

Q. Have I read the truth to you so far?

A. Yes.

Q. "Our job would take us from the Nickel Plate Junction to Whiskey Island during the course of a day's work."

Do I read that correctly?

A. Yes.

Q. And was that the fact?

A. That's a fact.

Q. "A part of each days' work took place by Lime Road near the Columbus Road bridge."

Is that the fact?

A. Yes.

Q. Period. "Now we always worked part of our day here. There is a track of the B & O Railroad which goes under-

neath the Columbus Road bridge, and it is in a depressed and lower area."

A. That's right.

Q. You read that, that is true?

[fol. 575] A. Yes.

Q. Everything contained thus far in your statement which you signed and said was the truth is the truth, isn't it?

A. Yes.

Q. "As a result there is a swamp there." Period. Correct?

A. That's what is there.

Q. It is the truth, isn't it, sir?

A. Well, I don't know what you would call a swamp. That's what we—

Q. When you read that you signed it?

A. Yes, I did.

Q. "There must always be about a foot of water or more there in even good weather and during the rainy weather it is much worse."

I am going to read that again, sir.

Mr. Leasure: Objection to the repetition, your Honor.

Mr. Dudnik: Well, I want to be sure I have it right.

Mr. Leasure: He can argue the case later.

Mr. Dudnik: I am not arguing the case. I am reading this again. I want to be sure I have got it right.

Mr. Leasure: I object to this. I object to the repetition.

[fol. 576] The Court: You have read it.

Mr. Dudnik: Your Honor, all right.

The Court: Unless he did not understand that part.

Q. Did you understand it?

A. Yes, I understand it.

Q. Did you understand the part where it says "There was a foot of water there in dry weather," did you understand that?

A. At times there were.

Q. You said here there always was, sir. Read that again. You didn't say at times here. "There must always be about a foot of water or more there even in good weather, and during the rainy weather it is worse."

That is what you said?

A. That's what I wrote, that's what he wrote.

Q. So even in good weather there was always a foot of water there, when you made this statement, Mr. Clason, wasn't there?

Mr. Leasure: Just a moment.

A. Yes.

Mr. Leasure: Just a moment? We are getting very argumentative here.

Mr. Dudnik: I don't think so.

Mr. Leasure: The thing has been marked, identified, and [fol. 577] it speaks for itself. I have not objected to the piecemeal reading of it although perhaps I could have. I am objecting now to his arguing with the witness as to what it says or doesn't say.

The Court: If the witness disagrees with any part of the statement, counsel has a right to re-refer to that part of the statement.

Where there is no disagreement, counsel ought to move on from where he is.

Mr. Dudnik: Thank you, your Honor.

Q. I will go on reading: "There is not enough drainage there or else it is clogged up."

That is true, isn't it?

A. That's true.

Q. "Now, Paul Delaria, the section foreman, has made several attempts to clear this swamp up, but it was never successful although if they put in a drainage ditch deep enough they could run it to the river which is only about 150 feet away."

You said that?

A. I said that, yes, but I didn't understand the condition there,

Q. Is that part I last read that you didn't understand the condition and that's why you said it, you might not have [fol. 578] said it if you understood the condition?

A. No, I might still have said it at the time but now I know why it can't be drained.

Q. Fine. "As a result of this condition there are quite a bit of bugs, rats, insects, and dead rotting pigeons there."

Did you say that, sir?

A. Yes, I did.

Q. Was it the truth?

A. Yes, it was.

Q. Do you know the meaning of quite a bit?

A. Well, there shouldn't be any there. So I would say that quite a bit would be, if there were two or three or even one, it would be quite a bit, compared to what should be there.

Q. You would say, sir, that you meant that one is quite a bit? Is that what you saw now?

A. Yes—no, that is not what I am saying now. I say, I did say there was two pigeons there at different times.

Q. So I get it straight—I am sorry?

A. And two dead rats there at different times.

Q. Never more than one at a time you said?

A. I never noticed more than one at a time.

Q. Now, then, would you say that is what you meant when you said there are quite a bit of bugs, rats, insects, and dead rotting pigeons there, you meant only one?

A. When your representative questioned me, he asked [fol. 579] me particular questions about the water and the rats and the pigeons and the bugs, and those answers he wrote down. That is his writing. It was in reply to the questions, to specific questions he asked me at that time.

Q. Did you read them?

A. Now we are going into more details of it, and it doesn't seem to me that it applies exactly in the same manner.

Mr. Leasure: About the middle of that answer there was part of it I didn't catch due to the noise. Could I have it read?

(Answer read by the reporter.)

Q. Did you read this statement?

A. Yes, I did.

Q. And you signed that it was the truth?

A. I did.

Q. Now, do you wish to withdraw that statement that there was quite a bit of rats there, do you wish to change that? You can answer yes or no, sir, I don't care.

A. Well, no, I don't wish to withdraw it, because at the time the statement was made it was my honest belief, according to the questions asked me, that was the best answers I could give at that time.

Q. Well, then—

A. I didn't write that down. Your man wrote all that down there.

[fol. 580] Q. But you read it?

A. I read it.

Q. Now, I want to ask you this, I don't want to be unfair with you, I do want to ask you this: You are qualifying at least in my opinion, you are qualifying the words "quite a bit"; on your direct examination you said you never saw more than one, and in this statement you said there were quite a bit of rats.

Now, sir, when did you remember this better, two years ago, or now two years later?

A. Well, I don't still remember too good, but I remember, I believe he asked me the question did I see any dead or rotting rats in that area, and I said yes, I did, and he wrote it down as you read it.

And now you asked me how many and when and where, and that is taxing my memory quite a bit to put a specific date on it. But it was in 1953 I know I saw a dead rat in there, and once previous to that I saw a dead rat in there. So over a period of time I saw dead rats in that puddle.

Q. Fine. Are you finished with your answer?

A. Yes, sir.

Q. Do we agree that you said before your memory was better two years ago about this incident than it is today?

Mr. Leasure: I think I will object to this repetition. It is argumentative.

[fol. 581] The Court: He may ask it.

Mr. Leasure: He has been over it two or three times already.

The Court: You may answer, sir.

A. Yes, sir.

Q. We agree on that?

A. Yes.

Q. Let's go on reading. "The condition was bad several years ago and is still bad."

Did you say that?

A. Yes, it is.

Q. Did you say that?

A. Yes.

Q. And it is still bad?

A. Yes.

Q. "I imagine that if James Gallick was bitten by an insect it could have come from this area. I don't know where or how James Gallick was bitten."

You did say that?

A. Yes. Well, I was asked if he worked in that area, if he could be bitten at that particular place and point, and not knowing whether he was or not, I would say that if there is such a thing he could be.

Q. That is the truth, isn't it?

A. Yes, sir.

[fol. 582] Q. "I gave this information in a signed statement to the Claim Agent for the railroad."

A. I did.

OFFERS IN EVIDENCE

Mr. Dudnik: I offer Plaintiff's Exhibits 23-A, 23-B, and 23-C in evidence at this time, your Honor.

Mr. Leasure: We have no objection.

The Court: Without objection it will be received in evidence.

Mr. Leasure: Are you finished?

Mr. Dudnik: Yes. No more questions.

Mr. Leasure: Just a few, Mr. Clason.

Redirect examination of William Clason.

By Mr. Leasure:

Q. There isn't any date, do you see any date on this statement, will you look at it?

A. I didn't look for a date on it.

Q. Will you look and see if there is one on there? I might have missed it.

A. No, sir, I don't see a date.

Q. Who was this man who came out to see you and who took this statement here, do you recall his name?

A. I don't know his name.

Q. Did he tell you who he was and who he represented?

[fol. 583] A. All he told me, he came to my home, and he told me that he was investigating the case of Jim Gallick, and if I could give him a statement.

Q. Did he have anybody with him that was taking down exactly what was said, exactly what you were saying?

A. No, no. It was just him.

Q. Did he ask you a lot of questions?

A. Oh, yes.

Q. Or a few questions? Did he sit there and talk to you for some time?

A. We went and sat in the kitchen. He wanted to sit there by the table where he could write. About an hour I would say.

Q. You say he was there about an hour?

A. Yes, more or less.

Q. Did it take him an hour to write this statement out?

A. Oh, no. We talked about it before he made that statement out, and he asked me various points in it, and then when we were through talking he wrote out the statement.

Q. Whose writing is this?

A. That is his writing. I didn't write it.

Q. It is his writing?

A. It is my signature.

Q. Whose choice of language is that?

A. That is his, too.

[fol. 584] Q. Did he tell you that he was from Mr. Dudnik's office or didn't he tell you where he was from?

A. He may have, and possibly he did. But I don't recall it. And if he did, I wouldn't know who Mr. Dudnik was.

Q. You wouldn't know who Mr. Dudnik was at that time, all right. Then after he made the choice of words and wrote this out he asked you to sign it?

A. That's right.

Q. And was it his idea or yours that you write here at the end, "I have read this and it is true."

A. He told me to write that.

Q. He told you to write that; he told you how to do it, then?

A. That's right.

Q. Now, your best recollection is that this was taken about two years ago?

A. I believe so. I could have been a little longer.

Q. That would be about 1957?

A. It wasn't any sooner, I am sure. It wasn't any sooner.

Q. That would be about three years after this thing is supposed to have happened?

A. Possibly.

Q. Now, Mr. Clason, I think you have already answered that you don't intend to change anything on this statement, and I want to ask you this question, do you want to change [fol. 585] anything in the testimony that you have given here this morning?

A. No, I don't.

Q. Have you testified truthfully this morning?

Mr. Dudnik: Objection. We assume he is testifying truthfully. That is an improper question.

The Court: He may answer.

A. To the best of my memory, I tried very hard to stick right with the truth.

Q. Tell us whether or not what you have said here this morning in greater detail is simply a statement of your knowledge of this situation in detail, as expressed generally in that statement?

A. Yes, it is. In that statement at that time, conditions weren't so severe with Jim there, as they are today, and I didn't try to hard to refresh my memory as I have since.

Q. When you said there was quite a bit of bugs, rats, insects, and dead rotting pigeons there, did you say over what period of time you were talking about?

A. Not there I didn't.

Q. But when you were asked about over what period of time, you have then told us what you did this morning?

Mr. Dudnik: It is leading, if your Honor please. There is an objection.

The Court: He has answered that question before, any- [fol. 586] way.

Q. I notice, Mr. Clason, that in this statement you don't say—and in the same thing that I just read—that there are quite a bit of dead rats. I will read it again: "There are quite a bit of bugs, rats, insects, and dead rotting pigeons there."

Did you mean to leave the impression by that that there are dead rats there, or what did you mean?

A. I don't know what I meant then.

Q. What is the fact?

A. But now the pigeons, the dead pigeons, over a period of time greatly outnumbered the dead rats. In fact, I haven't seen more than two dead rats in the time, during the time that we worked down there, to my recollection. One of them was in this water puddle.

Q. And where was the other one?

A. Well, the other was over at the end of stub track. We used to have a track number 8, and we kept an old car there, a rubbish car, and it was over by that car.

Q. You see live rats down there from time to time, I mean in this general area?

A. Oh, yes.

Q. Where do they seem to be mostly?

A. Well, you mean in '53 or now?

Q. Well, let's say '53 and '54?

[fol. 587] A. At that time we had an old freight house, it was a number of years old, and it was being torn down, and the rats were coming out from under that freight house, at the time they were tearing it down.

Q. Well, does it refresh your recollection to say that the freight house was torn down in 1951 and '52?

A. I believe it was.

Q. So that would have been before this incident then?

A. Well, I don't think it was completed by '53, I mean, it wasn't cleaned up by '53.

Q. But that is at a point away from Columbus Road bridge, is that correct?

A. Yes.

Q. How about down along the river, what have you seen down there with reference to some rats, live rats?

A. Occasionally you will see rats all along the river.

Q. When you said in this statement and I will read it—"The conditions was bad several years ago and it is still bad," will you tell us what you meant by that?

A. Well, we were talking about the water laying in this depression under the Columbus Road bridge. The water is still laying in the depression under the Columbus Road bridge.

Q. Were you talking just about the water or were you talking about something else when you made that statement?

[fol. 588] A. I presume that we were talking, I believe he asked me about a swamp, and we were talking about the water.

Q. When you made that statement you were talking about the water?

A. Yes.

Q. Did you intend to be talking at that time about dead pigeons or rats or insects, in that statement right there? A. No, I haven't seen them lately. I haven't worked down there for over a year. In the previous years there would occasionally be a dead pigeon or rat along that area.

Q. Occasionally?

A. Yes.

Mr. Leasure: I think that is all.

The Court: Anything further, Mr. Dudnik?

Mr. Dudnik: Yes, I have some further, your Honor.

The Court: Much further?

Mr. Dudnik: I may have. I may have quite a bit and I may not. I don't want to say so until I go over some things.

Mr. Leasure: Well, I have nothing further, your Honor, if we could finish up with this man.

Mr. Dudnik: I don't know whether we can, your Honor. [fol. 589] I won't say.

The Court: I think the jury may want to go out to lunch.

We will recess for lunch now. We will return at 1:45, once more with the admonition that you do not talk with anyone about this case, not even amongst yourselves.

(Thereupon an adjournment was taken to 1:45 p.m., Thursday, June 18, 1959, at which time the following proceedings were had:)

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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 76

JAMES GALLICK, PETITIONER,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO, CUYAHOGA COUNTY

PETITION FOR CERTIORARI FILED MARCH 3, 1962
CERTIORARI GRANTED APRIL 16, 1962

[fol. 590] Thursday afternoon session,
1:45 p.m., June 18, 1959

Mr. Dudnik: If your Honor please, may I state that at the conclusion or just before the lunch hour, I decided that my cross-examination was concluded. I released Mr. Clason. I did not keep him over the lunch hour.

The Court: The defense may call its next witness.

Thereupon the Defendant, further to maintain the issues on its part to be maintained, called as a witness JOSEPH P. CORRIGAN, who, being first duly sworn, was examined and testified as follows:

Direct examination of Joseph P. Corrigan.

By Mr. Hadden:

Q. Mr. Corrigan, will you keep your voice up so we can all hear what you have to say.

Would you give us your full name, please?

A. Joseph Patrick Corrigan.

Q. Who are you employed by, Mr. Corrigan?

A. Baltimore and Ohio Railroad.

Q. Are you married?

A. Yes.

Q. Family man?

[fol. 591] A. Yes, I am.

Q. How long have you been with the B & O, sir?

A. Since March 1, 1941.

Q. What sort of job have you been employed in during that period?

A. As a trainman.

Q. Whereabouts have you been employed by the B & O?

A. On the Akron Division.

Q. Well, where is your headquarters and where do you usually report for work?

A. In Cleveland, Cleveland yard.

Q. Did I get your address, sir?

A. No, sir.

Q. Will you give it to us?

A. 15106 Rosemary Avenue.

Q. Mr. Corrigan, have you ever worked on what is known among the railroaders as the downtown job?

A. Yes, sir.

Q. What does that consist of?

A. Working, switching cars in the downtown area, freight house.

Q. Can you tell us for how long you have worked that particular job? Do you still work on it?

A. No, I do not.

Q. When did you work on it?

[fol. 592] A. Oh, I suppose the last time I worked on it would be about six months ago.

Q. Did you hold that job continuously for any extended period of time?

A. There were times—I worked it for three or four months, possibly longer.

Q. On a number of different occasions?

A. Yes.

Q. Will you speak up so we can all hear you?

A. Yes, sir.

Q. You are not talking quite loud enough. Are you acquainted with the Plaintiff in this case, Mr. Gallick, who is over there?

A. Yes, I am.

Q. Do you recall any occasions when you worked with him on the downtown job?

A. On numerous occasions.

Q. Numerous occasions. Would any of those occasions have been in the year 1954?

A. Oh, yes.

Q. Now, Mr. Corrigan, in the course of your work on the downtown job you had occasion, did you not, to pass under the Columbus Road bridge?

A. Yes, I have.

Q. And you know where that is?

[fol. 593] A. Yes, I do.

Q. I am going to show you some photographs and I would like to have you see if you can identify them.

Well, I will show you first Plaintiff's Exhibit No. 4, and can you tell us what that shows?

A. Yes, that's the Columbus Road bridge.

Q. That is the bridge which you testified that you have passed on numerous occasions?

A. Yes.

Q. Now, I will show you also Plaintiff's Exhibit 3, can you tell us where that was taken?

A. It is also under the Columbus Road bridge.

Q. If you will speak a little slower and a little bit louder.

The Court: I was just going to say, Mr. Corrigan, speak up so the last juror there can hear you.

Q. Now, what is the fact, Mr. Corrigan, as to whether or not there has existed underneath that bridge any stagnant water during the time you have been familiar with it?

A. Yes, there has been standing water there as long as I have worked near there.

Q. What is the fact, sir, as to whether or not taking an area extending say 100 feet north and 100 feet south of that area, using geographic directions, you have ever seen any dead pigeons in that area?

[fol. 594] A. Yes, sir.

Q. What would you say, sir—

Mr. Dudnik: Is that a hundred feet north and south of the bridge?

Mr. Hadden: That's right.

Mr. Dudnik: Thank you.

Q. What would you say, sir would be the maximum number of dead pigeons which you have seen on any one occasion in that area that we have just referred to?

A. Possibly two or three.

Q. That is, two or three pigeons on any one time?

A. On one occasion.

Q. Have there been times during the time that you have been familiar with this area when there have been no pigeons at all in that area?

A. Dead pigeons?

Q. I am referring to dead pigeons.

A. Yes, there have been times when there have been no dead pigeons.

Q. Sir, with reference to dead rats, what would you say is the maximum number of dead rats which you have ever seen in the same area that we are talking about?

Mr. Dudnik: Are you talking a hundred yards either way, all inclusive? A hundred feet either way, Mr. Hadden? [fol. 595] Mr. Hadden: That is correct.

Mr. Dudnik: So that I understand. Thank you.

Q. Do you have the question in mind?

A. No. Would you please repeat it?

Mr. Hadden: Would you read the question?

(Last question read by the reporter.)

A. Possibly one. Two at the most.

Q. As to the occurrence of dead rats in that area, sir, would you say that was usual or frequent, or unusual or very seldom, or how would you describe it?

A. I would say that would be unusual.

Q. Would you say it was a rare occasion?

A. On rare occasions you would see a dead rat.

Q. With regard to insects, sir, can you tell us what observations you have made as to the numbers and types of insects in this same general area during the time that you have worked there?

Let's take the number first, what can you say as to that?

A. You would see flies and mosquitoes, but not in great numbers.

Q. Based upon your observations, have the numbers of insects which you have seen there been greater than or less than or about the same as the entire flats area generally? [fol. 596] A. I would say it would be the same as the flats area in general.

Q. And you mentioned flies and mosquitoes. Can you think of any other varieties of insects which you have had occasion to see in that particular area?

A. Occasionally you would see what we call a dragon fly.

A. A dragon fly?

A. Yes.

Q. Can you think of any other types of insects?

A. No, I can't.

Q. Well, what is the fact as to whether or not you have seen any insects of any usual or different varieties from those we are all familiar with in this part of the country?

A. I never specifically seen any that would be unusual, I mean, they would be the usual insects, nothing that—

Q. Thank you. Are you acquainted with the safety committee meetings which are held on the B & O?

A. Yes, I am.

Q. Have you ever attended any of those, sir?

A. Yes, I did.

Q. Where did you attend such meetings?

A. In the depot, in the old B & O depot.

Q. Can you tell us what the purpose of holding those meetings is, as far as the railroad is concerned?

A. To report any unsafe conditions.

[fol. 597] Q. And how often are they held?

A. Once a month.

Q. How are the persons who attend such meetings selected, or what determines who attends them?

A. I was selected by the trainmaster. He appointed me.

Q. I am not referring specifically to yourself. But is it a fact that from all various departments of the railroad there are people who attend?

A. There is a representative from the Operating Department and from the roundhouse and from the office forces.

Q. If I understood your answer to the last question correctly, you yourself were designated on one occasion as the brakeman who attended, were you?

A. That's right.

Q. For what period of time was that, sir?

A. I believe about six months.

Q. Was that in the year 1954?

A. Yes, it was.

Q. Are you a member of the Brotherhood of Railroad Trainmen, Mr. Corrigan?

A. Yes, I am.

Q. What is that organization?

A. It is actually a union of railroad employees and trainmen.

Q. Does the Brotherhood of Railroad Trainmen have any procedures in and of itself apart from procedures which [fol. 598] may exist on the railroad, for reporting and remedying unsafe or unsanitary conditions on the railroad property?

A. Yes, they do.

Q. Would you describe those, please?

A. Well, in the course of a meeting it is asked from the floor if there are any unsafe conditions to report.

Q. And what happens if such condition is reported?

A. Well, the local chairman will take it up with the superintendent and correct it. If it is not corrected it would be—

Q. Who is the superintendent, so the jury can understand that.

A. The superintendent?

Q. I don't mean his name, but what is he?

A. He is head of a division.

Q. And where is his headquarters?

A. In Akron, Ohio.

Q. He has jurisdiction over the Cleveland area among others, does he?

A. Yes.

Q. And what happens further as a complaint of that nature is progressed?

A. Well, if the superintendent doesn't handle it to the satisfaction of the local chairman, the local chairman will take it up with the general chairman, and it is taken, to [fol. 599] Baltimore and handled with the labor relations department.

Q. If having followed that procedure the condition of which the complaint is made is still uncorrected, what happens after that, if anything?

A. It could be further handled with the Interstate Commerce or the Public Utilities Commission.

Q. What has been your experience, Mr. Corrigan, as to the general effectiveness of the procedures which you have just described?

Mr. Dudnik: Objection as to the general effectiveness of the complaints. I don't think that is material here at all. The question is how it is done.

The Court: There was a first part to that question.

Mr. Hadden: The question wasn't completed in the first place.

Mr. Dudnik: I am sorry, I withdraw my objection until you complete your question. I am sorry.

The Court: Restate the question.

Q. What has been your experience, Mr. Corrigan, as to the effectiveness of the Brotherhood procedures for handling complaints such as you have described, in so far as getting the complaints remedied and the conditions com-
[fol. 600] plained of corrected?

Mr. Dudnik: There is an objection.

The Court: He may answer.

A. They are very effective.

Q. Have you or have you not ever been an officer of the Brotherhood?

A. Yes, I have.

Q. During the course of your work, Mr. Corrigan, as long as you have been employed by the B & O Railroad, have you ever made yourself any complaints of the conditions which we have talked about underneath the Columbus Road bridge to anyone?

A. No.

Q. Have you heard of any other employee of the railroad who has made such a complaint?

A. Well, I never handled a complaint myself, so I don't know offhand whether there has ever been any.

Q. As far as you know, there has not been, is that right?

A. That's right.

Q. Have you ever yourself been bitten by an insect underneath or in the vicinity of the Columbus Road bridge?

A. Very possibly.

Q. Well, if you have been, what sort of a bite would that have been, if you can remember?

[fol. 601] A. Possibly a fly or a mosquito.

Q. Have you heard of any other people on the railroad apart from Mr. Gallick who have sustained such bites in the same area?

A. No, I haven't.

Q. So far as your own experience is concerned under the bridge or in that vicinity, whatever bites that you may have had there, have they been more frequent or less frequent than you have received any place else, at home or elsewhere?

A. No, I would say the condition is normal.

Q. Just the same as any place else?

A. Yes.

Q. During the course of your employment by the railroad have you ever heard of any complaints of any nature with reference to sanitary conditions on the job there in the general area around the Columbus Road bridge?

A. When I was on the safety committee I handled a complaint for a drinking fountain in the locker room. There was a tin cup on the wall, and we handled that at the meeting.

Q. So we can be sure where that was, was that—where is the locker room to which you refer?

A. In the basement of the old depot.

Q. So the jury can understand where that is, will you step down just a second and point out where the old depot is?

Do you want to come over here so you won't block their [fol. 602] view.

This is the Superior Bridge, this is the Cleveland Union Terminal Bridge, this is the Columbus Road Bridge in the red circle, and will you point out the old depot?

The Court: Will you stand to the side.

Q. This is the Carter Street Bridge, will you point it out, just for the sake—is this not the old passenger depot?

A. Yes, that is.

Q. All right, you may take the witness stand again, Mr. Corrigan. Can you give us any idea of how far that area, the station or old depot is from the Columbus Road bridge itself, in your own approximation?

A. Possibly 300 feet.

Q. Have you ever heard of or handled any complaint, any safety complaint, with reference to the Columbus Road bridge itself, sir?

A. No, I don't believe I have.

Q. Well, to refresh your recollection, Mr. Corrigan, isn't it a fact that at one point you had some complaint made about the close clearance involved there?

A. Well, it didn't involve the close clearance specifically. The telltales that were warning the trainmen on top the

cars were down, and that was brought up at the safety meeting.

Q. So the jury can fully understand what that refers to, [fol. 603] telltale is the string that hangs down from an overhead wire?

A. Yes.

Q. The trainmen hit that, do they, how does that work?

A. If you are riding on the top of the car it will brush you and warn you.

Mr. Dudnik: You better bend down then?

A. Yes.

Q. What can you yourself say based on your own experience, Mr. Corrigan, as to the clearance between boxcars and what have you under that bridge and the bridge itself?

A. It is quite close. It is definitely a close clearance.

Q. One final question, Mr. Corrigan. Have you had occasion to observe at any time in the vicinity in the general area which we are discussing, showing you for the purpose of the question on the picture over there, conditions in and about the New York Central tracks in the vicinity of the Cleveland Union Terminal?

A. In the general vicinity of Seneca Street Yard there is a garbage pail, I imagine that is what they call it, where they dump the garbage and refuse when they clean the coaches in the Terminal.

Q. I wonder if you would step down, again, to the easel there and see if you can locate that, the garbage dump that you referred to.

[fol. 604] Mr. Dudnik: You can point it out to him. The picture is confusing.

Mr. Hadden: All right.

Mr. Dudnik: The witness seeing this for the first time is easily confused.

Mr. Hadden: This is the passengers' depot, and this is Canal Road here, and these I believe are the tracks. Will you stand back just a little bit.

A. The Sherwin-Williams building wouldn't be shown here.

Q. Well, on what street was the area located?

A. Columbus Road.

Q. Columbus Road, are you sure?

A. Canal Road.

Q. Canal Road?

A. That's right.

Q. How far off the edge of the picture would you say it was located? You may take the stand.

A. Four or five hundred feet, I imagine.

Mr. Dudnik: You mean beyond the edge of that picture?

A. Yes.

Q. Have you had occasion, sir, to observe in that area any rats or pigeons or other forms of life?

A. Yes, I have.

[fol. 605] Q. What would you say as to the frequency of your having seen those in that location?

A. Quite often the door was left open, and there were pigeons and rats feeding on the garbage.

Q. Have you ever seen any dead rats or dead pigeons in the same vicinity?

A. Yes.

Q. The garbage pit or dump, whatever it may be, that we have just been talking about, is that on B & O property?

A. No, it is not.

Mr. Hadden: You may examine.

Cross examination of Joseph P. Corrigan.

By Mr. Dudnik:

Q. I take it, Mr. Corrigan, you are telling us that conditions were worse on the New York Central than they were on your railroad?

A. At the two particular points that I was questioned on, I would say yes.

Q. And between an area, of an area about 100 feet this way, and 100 feet that way—I am going on both sides, I am going north and south of the Columbus Road bridge, the most you ever saw was one or two rats in that two hundred foot area?

A. Yes.

Q. And the two or three dead pigeons, I presume, would [fol. 606] be somewhere in this two hundred foot area?

A. Yes.

Q. That is two or three?

A. Yes.

Q. And that would include the ditch we talked about, wouldn't it?

A. Yes.

Q. How many would be in the ditch, and how many of the other one or two pigeons would be in the two hundred foot area?

A. The two hundred foot area would include the ditch.

Q. What?

A. The two hundred foot area would include the ditch.

Q. It would include the ditch?

A. Yes.

Q. And those two or three dead pigeons that you saw, at the most at any one time, when you did see two, where did you see one, and where did you see the other?

A. Well, somewhere in that area laying on the ground. I couldn't just pinpoint where.

Q. How close can we get to the ditch?

A. I just couldn't pinpoint where I saw the one today and where I saw it the next day.

Q. Would you see that often, or would it be cleaned up and be nice and clean?

A. I never saw it cleaned up.

[fol. 607] Q. You never saw it cleaned up. You mean they were there all the time?

A. They would be there until they disintegrated or rotted or whatever happened.

Q. They lay there until they rotted and disintegrated, is that right, Mr. Corrigan?

A. Yes.

Q. And you worked in that area how long, sir?

A. Since 1941. 19 years.

Q. 19 years; pretty often during that time?

A. Yes.

Q. Still there, you still work there?

A. Yes, I do.

Q. For the B & O?

A. Yes.

Q. And had you seen standing water under the bridge as long as you have worked there?

A. Yes, sir.

Q. True, isn't it?

A. Yes.

Q. And that was when they had two sets of tracks, too, wasn't it?

A. That's right.

Q. And you saw the same standing water before they changed to one track, and after they changed to one track. [fol. 608] isn't that so?

A. Yes.

Q. No difference in the appearance of it, was there, I mean generally?

A. That's right.

Q. That is correct, isn't it?

A. Yes.

Q. You have seen dragon flies under the bridge and you have seen mosquitoes under the bridge. What do you call an unusual bug?

A. Well, I would say I suppose a bug that I never seen before.

Q. I think that is a good statement. Now, what bugs have you ever seen in your life besides the mosquito and a dragon fly?

A. I really couldn't answer that question.

Q. Do you recall of any other type of bug you have ever seen besides a mosquito and a dragon fly?

A. I couldn't give you a name for it. I have seen them, yes.

Q. No, no. Describe them.

Mr. Leasure: Do you mean there, or at any place?

Mr. Dudnik: Well, we will get first any place, and then we will take it there, Mr. Leasure.

Mr. Leasure: I am objecting unless the question is clarified. It is not clear at all.

[fol. 609] Mr. Dudnik: Let's say any place.

Q. First I want to know the kind of bugs you have ever seen, and then we will talk about whether you have seen them in this area; unless you can't recall seeing any place any other bug outside of a mosquito or dragon fly or insect?

A. Naturally I have seen other insects, yes.

Q. Have you seen hard-shelled, brown bugs, an inch in size, ever?

A. Are you referring to a June bug?

Q. Yes.

A. Yes.

Q. You have seen June bugs?

A. Yes.

Q. Have you seen any there at any time under the bridge, or in that area?

A. I don't know.

Q. You don't know. You don't recall whether you have or not, is that it?

A. That's right.

Q. Is that a fair statement?

A. Yes.

Q. Have you seen bugs two inches in size anywhere in your life?

A. I don't believe I have.

Q. An inch and a half?

[fol. 610] A. I can't answer that question. I don't know.

Q. Can you recall at any time in your life that you had ever seen a bug an inch and a half long?

A. Yes.

Q. All right. Have you ever seen any in that area?

A. Yes, I am referring to a dragon fly, I have seen them there.

Q. No, I am talking about a brown hard-shelled bug or insect.

A. No.

Q. Never in your life seen one?

A. No, I haven't.

Q. Would you say that an area that had dead birds and pigeons and other insects where men were working would be an unsafe area?

Mr. Leasure: Objection, your Honor.

Mr. Dudnik: He is a safety man and testified about complaints and everything else, your Honor.

Mr. Leasure: That calls for a conclusion, and grossly incomplete.

Mr. Dudnik: Your Honor, he testified as a safety man as to what conditions were safe, that he would report it if they weren't.

The Court: He testified he had been on the safety com-
[fol. 611] mittee. I don't think that the basis for the qualifications of this man have been established.

Q. Now, then, may I put it to you this way: Would you report as the safety man an area alongside of the tracks which had water in it, stagnant water alongside of it, which contained dead pigeons and birds, would you report such a condition as unsafe?

Mr. Leasure: We will object to that, your Honor, unless more detail is given.

The Court: He may answer that question.

A. I have never reported that area.

Q. No, that isn't my question. You may never have seen it and that's why you didn't report it. Will you read the question?

(Question read by the reporter.)

Mr. Leasure: I think I will object to the last question, your Honor. He has answered it by saying he never saw such a condition. Then from there on it becomes hypothetical as to what he might do.

The Court: This question is a little different than the previous question to which you objected and which objec-
[fol. 612] tion the Court had sustained. I am going to overrule this objection and the witness may answer the question.

Q. Did you understand the question, sir?

A. No.

Q. We will have it read to you again.

(Following question was read by the reporter:)

"Now, then, may I put it to you this way: Would you report as the safety man an area alongside of the tracks which had water in it, stagnant water alongside of it, which contained dead pigeons and birds, would you report such a condition as unsafe?"

A. I don't know, I don't know.
Q. You don't know?
A. No, I don't.
Q. And if that condition also had insects around it, besides the dead rats or dead pigeons and birds, would you then report it as the safety man?

Mr. Leasure: Objection, your Honor.
The Court: He may answer.
Mr. Leasure: It becomes argumentative.
The Court: He may answer.

A. I wish you would clarify the question. Would you repeat it, please?
Q. I will have it read to you again, sir. Tell me what part of it you don't understand and I will most certainly clarify [fol. 613] it for you.

(Last question read by the reporter.)

A. Yes, yes, I would.
Q. You would?
A. Yes.
Q. Would you report it if you worked around there and were not a safety man?
A. Yes.
Q. Did you ever report such a condition?
A. No, I did not.

Mr. Dudnik: Mark this, please.

(Plaintiff's Exhibit 24-A and 24-B were marked for identification by the reporter.)

Q. Mr. Corrigan, you of course have always told the truth about what you knew about this case, had you not?
A. Yes, sir.
Q. You had a meeting with the Claim Agent the other day?
A. Yes, sir.
Q. You went over the facts?
A. Yes, sir.
Q. And you had a meeting before that, did you not, with the Claim Agent?
A. Yes.

Q. You went over the facts?

A. Yes.

[fol. 614] Q. No matter whom you told about this in the past, whether it be the Claim Agent or anyone else, you would never misstate the facts, would you?

A. No, sir.

Q. Would you read this signature here, please, on Plaintiff's Exhibit 24-A?

A. Joseph P. Corrigan.

Q. Who signed that?

A. I did.

Q. Mr. Corrigan, will you read this signature here?

A. Joseph P. Corrigan.

Q. Did you sign that?

A. Yes, I did.

Mr. Dudnik: Now, Mr. Leasure, I am going to read out of context because it makes my point, but I will include the whole thing later.

Mr. Hadden: Say that again, what are you going to do?

Mr. Dudnik: I am going to read out of context but I will include the whole report later.

Q. Now, I want you to read with me and see if I read correctly, this statement:

"I have been here employed by the railroad and that sewage and water has been there for at least 15 years."

Was that a truthful statement?

[fol. 615] A. Yes.

Q. You made that statement?

A. Yes, I did.

Q. In this report?

A. Yes.

Mr. Leasure: Your Honor, before this goes any further, I would like to object for the record. There is no inconsistency between what has been read and what he testified to.

The Court: I think Mr. Dudnik made it clear he was reading out of context, and if you want to take the time and have him read the entire statement, it is all right with the Court.

Mr. Leasure: Well, our point is, your Honor, we are objecting to the relevancy of this, since his testimony has not conflicted with what he said here.

Mr. Dudnik: If you just let me read the next sentence, Mr. Leasure.

Mr. Leasure: Well, why don't you start where you claim an inconsistency exists?

Mr. Dudnik: May I try the lawsuit my way, Mr. Leasure?

Mr. Leasure: As long as you do it properly. I am objecting.

[fol. 616] The Court: Mr. Dudnik has stated he is laying the foundation. I want to see what the foundation is.

Q. That is what you said, sir?

A. Yes.

Q. And it was the truth?

A. Yes, sir.

Q. And you had read this statement before you signed it, hadn't you?

A. Yes, I have.

Mr. Leasure: I can't hear what the witness said.

Mr. Dudnik: He said yes.

The Court: Mr. Corrigan, speak up so the last juror there can hear you and the lawyers on the other side of the table can hear you.

Mr. Leasure: Your Honor, my principal problem is that Mr. Dudnik insists apparently in standing between me and the witness.

Mr. Dudnik: I am sorry. Shall I stand over here? I want the witness to read this with me. Is this better for you?

Mr. Leasure: All right. I just want to hear what he says, that's all.

Mr. Dudnik: Fine.

[fol. 617] Q. Now, we will go over to the next sentence: "There has been dead birds and pigeons there, also, and perhaps the insects have come from that."

Did you say that?

A. Yes, I did.

Q. "The only thing the railroad would have to do to get rid of this pool of water and sewage and other dead animals and birds would be to put in a sewage system."

Did you say that?

Mr. Leasure: Just a moment. Nothing was said in his direct testimony about that. Nothing has been shown that he has any knowledge of the situation, or the problems involved, and I think I will object to any inquiry along that line, unless it is first shown that he is qualified, and then if he is asked a question about it directly. Then if he gives an answer contrary to what is said there, it might be relevant.

The Court: Are you talking now about the physical condition?

Mr. Leasure: A possible solution. That is what he is now talking about.

Mr. Dudnik: No, your Honor. He understands that this man had testified that he would make a report under [fol. 618] certain conditions. Now I want to show what he told us the conditions were, and that is exactly in line with the questioning I started, and I am laying a foundation.

The Court: The witness may answer.

Mr. Dudnik: Read that question, please, and the answer.

(Last question read by the reporter.)

A. Yes, I did.

Q. Did you further say, "There may be a sewage system there, but it may be clogged up."

Did you say that?

A. Yes, sir.

Q. Mr. Corrigan, you were the safety man there representing the railroad employees for some time, were you not?

A. Yes.

Q. And how long did you serve as a safety man representing the railroad employees?

A. I was on the committee for about six months.

Q. And when was that, sir?

A. In 1954.

Q. 1954?

A. Yes.

Q. That is about the same time that Mr. Gallick was hurt, is it not?

[fol. 619] A. Yes.

Mr. Leasure: We object to that, your Honor. The phraseology, anyway, is certainly—

Q. Was stung or bitten, is that not so?

A. Yes.

Mr. Leasure: Go ahead, I won't object, go ahead.

Mr. Dudnik: Thank you.

Q. And as safety man, you, your job was to report all unsafe conditions to the company on behalf of your co-workers, isn't that a fact?

A. Yes, sir.

Q. Did you ever report to the company anything about the condition that I just read to you from in your statement?

A. No, sir.

Q. Did you know how and where Mr. Gallick got his trouble?

A. I do not know.

Q. I believe you said that you had heard several rumors?

A. That's right.

Mr. Leasure: I still object to this. It is right in the statement, why don't you read it to him, just like you read the rest of it?

The Court: I am assuming that the statement will become part of the evidence, and either side will have a right to [fol. 620] refer to the statement.

Mr. Dudnik: May I have the question read, your Honor?

(Question and answer were read by the reporter.)

Q. Who did you hear these rumors from?

A. From my co-workers, From the co-workers.

Q. From how many co-workers did you hear these rumors?

A. I really can't say.

Q. Were there many or few?

A. I will say five or six.

Q. Well, so we may go over the rest of this statement, which may not be by way of contradiction, if you want to object, but I want to get the whole statement in; do you object if I do?

Mr. Leasure: I object. If you are going to offer it, I object to reading it. I object to the duplication. I may object to it upon introduction, but let's proceed in an orderly manner.

OFFERS IN EVIDENCE

Mr. Dudnik: I offer Plaintiff's Exhibit 24-A and 24-B into evidence.

Mr. Leasure: I am objecting to it.

The Court: Objection overruled. The exhibit will be received into evidence.

Mr. Leasure: Now, to answer your question, Mr. Dudnik, [fol. 621] I will have no objection if you want to read from it.

Mr. Dudnik: You read it. You have your objection, now read it.

Thank you, Mr. Corrigan, I have no more questions.

Redirect examination of Joseph P. Corrigan.

By Mr. Hadden:

Q. Mr. Corrigan, what do you recall about the circumstances under which this statement was taken?

A. Someone representing Mr. Gallick came out to my house.

Q. Do you remember how long ago that was?

A. It would be two or three years, anyhow. I think about three years.

Q. Did he identify himself to you?

A. Apparently he did, or I wouldn't have gave him a statement.

Q. Does your memory now hold to the fact that he did say who he was?

A. Yes, he did.

Q. Do you recall that he did?

A. Yes.

Q. And you talked the matter over with him, did you?

A. Yes, I did.

Q. And for how long a time was this subject under discussion?

[fol. 622] A. For a very short length of time.

Q. Did you say where this was, at your home did you say?

A. Yes.

Q. How did these pieces of paper come into existence?

A. How did they come into existence?

Q. Who wrote them down, who wrote the words appearing apart from the signature?

A. The representative, the man who represented himself as representing Mr. Gallick.

Q. And this is his handwriting, then, the man's, except for the signature?

A. Yes.

Q. Did you dictate this to him, or is this his selection of language?

A. Well, we talked it over. I don't remember him writing it down exactly as I said it.

Q. It was his choice of words, then, in other words? Isn't that what you said?

A. Yes.

Q. One or two more questions, Mr. Corrigan. I will read to you a brief portion of this. It is written here on the statement the following: "I have heard several reports of how he was injured. One of them" referring to Mr. Gallick, of course,— "One of them seemed to be that he was bitten by an insect at the C.L. & W. yard at West Third [fol. 623] Street" — do you know what that is, the C.L. & W.?

A. Yes, I do.

Q. What is it, would you tell us that?

A. It is a separate yard from Seneca Street, or Clark Avenue yard.

Q. Do the initials C.L. & W. stand for something?

A. It was a railroad that was incorporated with the B & O.

Q. It is part of the B & O?

A. Yes.

Q. Well, continuing the text of this: "Insect at the C.L. & W. yard at West Third Street and Quigley Street," can you tell us where that location is, sir?

A. West Third and Quigley?

Q. Yes.

A. In relation to what?

Q. Well, can you tell us where in relation to the Columbus Road bridge it is, for example, how far away in terms of miles?

A. It would be a mile or two anyhow.

Q. A mile or two. Handing you this statement, Mr. Corrigan,—I will withdraw the question. We have no further questions.

Recross examination of Joseph P. Corrigan.

By Mr. Dudnik:

Q. I think I have one or two questions, Mr. Corrigan. Mr. Hadden stopped in the middle of a sentence. I want to [fol. 624] finish the sentence.

He read, "I have heard several reports of how he was injured," did he not?

A. Yes.

Q. "One of them seemed to be that he was bitten by an insect at the C.L. & W. yard at West Third Street and Quigley," is that the end of a sentence?

A. No, it is not.

Q. Finish it, finish reading that sentence.

A. "And another place at a ditch which lies along the B & O right-of-way between Columbus Road bridge and Carter Street bridge."

Q. That is the end of the sentence?

A. Yes.

Q. Now, you wouldn't have signed this if it wasn't true, would you?

A. No.

Mr. Dudnik: Thank you very much.

Further redirect examination of Joseph P. Corrigan.

By Mr. Hadden:

Q. One more question. Mr. Corrigan, have you ever seen twenty to thirty pigeons, dead pigeons and dead rats, in an area of two hundred feet on either side of the Columbus Road bridge?

[fol. 625] A. No, sir.

Q. If you had, would you have reported that?

Mr. Dudnik: Objection. What he would have done—objection.

The Court: He may answer. I permitted him to answer.

Mr. Dudnik: Okay.

The Court: What is your answer, Mr. Corrigan?

A. I don't know.

Mr. Hadden: That is all we have.

The Court: Ladies and gentlemen of the jury, there will be a brief recess.

You will return to the jury room once more with the admonition that you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

[fol. 626] Thereupon, the Defendant, further to maintain the issues on its part to be maintained, called as a witness Dr. Louis A. Stearns, who, being first duly sworn, was examined and testified as follows:

Direct examination of Dr. Louis A. Stearns.

By Mr. Hadden:

Q. Doctor Stearns, you were here a minute ago and you see that it is necessary to keep your voice up, so if you will please do that I will appreciate it.

Can I have your full name, please?

A. Louis A. Stearns.

Q. Where do you live, Doctor Stearns?

A. Newark, Delaware.

Q. What is your business or profession, Dr. Stearns?

A. I am a medical entomologist.

Q. That is a big word; can you tell us a little bit about what it means, the word entomologist?

A. It is concerned with insects that transmit, are related to disease. Entomology has to do with insects and things like that.

Q. Would it be fair to say if you are an entomologist you are generally concerned with the habits of insects, is that right?

A. Yes.

[fol. 627] Q. Doctor, can you tell us a little bit about your training and education in this field? First of all, did you attend any college or university?

A. Well, I will have to go back about 45 years. I completed my pre-medical training with a four year course at Ohio Wesleyan University, getting a B.A. degree in 1915.

Then I went to Ohio State and took advanced medical studies, including medical entomology, and eventually instead of going into medicine I went in entomology, and I have a Master of Science degree and a Ph.D. in biological sciences.

Q. What university it that?

A. Ohio State.

Q. Does that complete your training?

A. Except I completed a course in tropical medicine in the Army Medical School just prior to World War II.

Q. What, sir, has been your experience apart from formal —what has been your experience apart from formal educational training in the field of entomology?

A. Well, I have been instructor in zoology and entomology at Ohio State, professor of biology in the Alma College in Michigan.

Q. College of what?

A. Professor of biology in Alma College, Michigan. I have been an associate state entomologist in Virginia, in New Jersey, and Ohio; and for 28 years I was head of the [fol. 628] Department of Entomology in the University of Delaware, and retired in '57.

Q. Do you now hold any post with any educational institution, Doctor?

A. I am simply emeritus head of the department.

Q. That means you are retired?

A. I am retired but I have all the facilities to work there.

Q. Does that describe pretty much your training and experience in the field?

A. Except during World War II, for three years I was chief sanitary officer of the U. S. Ninth Air Force in Libya, Egypt, and India. In the European Theater I was staff entomologist on the supply run to Russia, and I also taught in the Army Medical School in Panama.

Q. Are you a member of any professional societies or associations having to do with this general field?

A. I have either been a president or vice-president of the major societies in entomology.

Q. Can you give us an example so there will be no question?

A. Well, the American Association of Economic Entomologists; the Entomological Society of America; and the American Mosquito Control Association. I have either been a president or vice-president of each of these organizations.

Q. Having all this in mind, Doctor, would it be fair to say that you are a bug expert?

A. I call myself a bug doctor.

[fol. 629] Q. Doctor, did you at our request at any time happen to have occasion to visit the flats area of the City of Cleveland?

A. Yes. I spent about three hours on Tuesday, and I walked over the area which seems to be the area of interest, and covered the flats area down to what is it, Clark Avenue, Clark Street, or something like that.

Q. Well, in connection with your visit down there, did you have occasion, sir, to visit the area in the vicinity of what is known as the Columbus Road bridge and the B & O Railroad tracks?

A. I did.

Q. Now, I will show you some pictures and ask you whether you can identify them.

Doctor, showing you first Plaintiff's Exhibit 4—I will give them to you all at once in order to save time—do you want to look at all of these, sir; I guess it is Exhibits 1 through 4, just for the purpose of identifying them.

A. Yes. I walked over this area. This is the Columbus bridge?

Q. Yes.

A. Right here.

Q. And you are pointing to the bridge shown in Plaintiff's Exhibit 4?

A. Yes.

Q. Will you look at the other one, sir, please?

[fol. 630] A. This looks like a closeup view of this, under this same bridge?

Q. That is the bridge which you visited?

A. Yes.

Mr. Dudnik: What is that number, please?

Mr. Hadden: That is Exhibit 3.

Q. And the other pictures show the same general area, do they not?

A. Going in the other direction. And this is the same.

Q. Exhibit 1 is another view. Doctor, for the purposes of this question, I will ask you to assume that for some time underneath the bridge which is shown in the pictures, and which you have visited, there existed a pool of standing water of the same approximate size and location as shown in those pictures which I have just showed you.

That there were present in the area, in the same area, quantities of dead pigeons and possibly some dead rats at the time we are interested in, which was the month of August.

I will ask you, Doctor, if you have an opinion, based on those assumptions, whether any types or varieties of insects which are likely to attack human beings could reasonably be expected to be attracted to or be present in that area because of those conditions, and I will ask you just to say yes or no as to whether you have an opinion?

[fol. 631] A. You are asking whether I have an opinion?

Q. That's correct.

A. Yes, I do.

Q. And will you tell us what the opinion is, sir?

A. I would say from observing it this week, about the only two insects to be concerned, about the only insects that would be concerned would be mosquitoes.

Q. When you said two insects—

A. I was thinking of two species, two species.

Q. As far as you are concerned, mosquitoes are the only risk presented by this area?

A. That's right.

Mr. Dudnik: Only what, risk?

Mr. Hadden: Only risk presented by this area, so far as insects likely to attack human beings.

A. That's right.

Q. Now, Doctor, you are familiar, are you, sir, with the types of varieties and diseases of insects which may generally be found in this part of the country?

A. Oh, yes. I have lived for eight years in Ohio.

Q. Do you know of any insects native to this area which is likely to attack a human being, which approximates two inches in length and one-half inch in diameter, or roughly speaking, the size and shape of my little finger or yours? [fol. 632] A. That size in this particular area?

Q. Yes, sir.

A. I don't know of any that would attack man.

Q. What, sir, is in your opinion the insect which comes the closest to that size which would be so likely to attack a human being?

A. The closest insect to that size would be one of the—it would be the largest horse fly in this area.

Q. What, sir, is the largest size that those have been recorded to have reached?

A. Well, the body runs approximately—

Q. I didn't get the word you used; the what?

A. The body runs approximately one to 1-1/8 inches long. It is about a quarter to 5/16 inch thick.

Q. That is considerably less, would it be fair to say, than half the size of the other insect?

A. Well, at least half, possibly a little more.

Q. Would it be reasonable to assume, Doctor Stearns, that horse flies would be attracted to, or would breed or feed in the area which I have described containing the pigeons and rats underneath the Columbus Road bridge?

A. No, they would not.

Q. Would it be reasonable to—

Mr. Dudnik: Just a minute, please. Would you read the question?

[fol. 633] (Last question read by the reporter.)

A. And my answer was no, they would not.

Q. Doctor Stearns, would it be reasonable to assume that a horse fly such as you have described which happened to be passing through this area in a casual way, although not attracted by it, could be expected to alight upon any of the dead animals which we have mentioned, or come in proximity to the standing pool of water?

A. I wouldn't say they would alight on dead animals because they are simply interested in live animals, that is their prime interest.

Q. Doctor, I will ask you to assume for the purposes of this question that a man about 5 feet 9 in height, and weighing 205 pounds, is walking along a railroad track; that he is wearing shoes on his feet which extend to about one or two inches above his ankle, and socks which extend about an inch above those.

That he is also wearing cotton khaki trousers of the usual type, the bottoms of which or the cuffs of which extend to about the top of his shoes.

That at a certain point in his walking he stops, he turns around, faces in the direction from which he came, and stands still for about one-half to three-quarters of a minute.

That he then turns in the direction which he was originally walking, and after taking about two steps feels a [fol. 634] bite or sting which he describes as being of an insect about an inch or two above the back of one of his knees and inside his pant leg.

Doctor, on those assumptions do you have an opinion as to the length of time that the insect was on the man's body or clothing prior to the time that he felt the bite, and again a yes or no answer as to whether you have an opinion?

A. Yes, but what I want, are these pants free like these, or tucked in?

Q. Yes, free.

A. They are free?

Q. Yes.

A. Yes, I have an opinion on that.

Q. And would you state, sir--

Mr. Dudnik: Just a moment. Your Honor, I will ask you whether you recollect any testimony as to the pants being free? I don't know. If there is no such testimony I will object. But I have no recolllection.

The Court: There wasn't any testimony that they were tight against the shoes.

Mr. Dudnik: Nor was there any that they were free.

The Court: The only testimony was that they were the normal every day pants trousers that are worn by work-[fol. 635] men working in this type of work, as I remember.

Q. Doctor, would you amend the question to assume the fact which the Court has just stated, that it was an ordinary type.

A. No, no--yes, I have an opinion about that.

Q. Now, will you tell us what your opinion is as to the length of time which would be necessary?

A. I would say it was highly improbable that an insect could reach that point inside of five or possibly ten minutes from the time that it got on the ankle, at least five or ten minutes.

Mr. Hadden: You may examine, Mr. Dudnik.

Cross examination of Dr. Louis A. Stearns.

By Mr. Dudnik:

Q. I want you to be patient with me, Doctor. I never heard of the word entomologist until last week. Did you come here from Newark, Delaware, for the purpose of testifying in this case?

A. That's right.

Q. Newark is how far from Baltimore?

A. Oh, it is about 60 miles. It is right in the outskirts of Wilmington, put it that way.

Q. Are you a bacteriologist?

[fol. 636] A. Am I a what?

Q. Withdraw that. Have you studied bacteriology?

A. I have.

Q. Have you ever cultured dead rats?

A. I have taken only a four-hour course in bacteriology in pre-medical training.

Q. Four hour?

A. That is the regulation course.

Q. Have you ever cultured dead rats?

A. No.

Q. Have you ever cultured dead pigeons?

A. No.

Q. You do not know what if any bacteria would be prevalent or be found on decaying dead rats?

A. I cannot give an official opinion or professional opinion on it.

Q. You don't think you are qualified, is that it?

A. I am an entomologist.

Q. And the same with dead pigeons?

A. That's right.

Q. When you visited the Columbus Road area the other day did you see an area of water under the bridge that was similar to the ones you have been shown in these pictures?

A. Less extensive.

Q. Less extensive. Did you see any dead rats in them? [fol. 637] A. No.

Q. Any dead pigeons?

A. No.

Q. Any bugs flying around?

A. Yes.

Q. Any insects?

A. Have I seen insects?

Q. Yes.

A. Yes, I saw insects. Bugs are insects.

Q. I am sorry, I told you I didn't know.

What are these aquatic bugs?

A. Beg pardon?

Q. What is an aquatic bug?

A. Well, simply an insect that lives and makes its living around water.

Q. Clean and dirty?

A. Clean or dirty, either one.
Q. Clean or dirty, either one?
A. That's right.
Q. Where do you find them, do you find them anywhere?
A. Oh, yes.
Q. Do you find them in Cleveland? Correct?
A. Oh, sure.
Q. I take it then that in this area you may find aquatic insects around clean and dirty water?
[fol. 638] A. Yes. You can find them anywhere.
Q. In any particular months?
A. No.
Q. You may find them in June?
A. Oh, yes.
Q. And July, and August?
A. (Witness nods.)
Q. How big are they—

The Court: Doctor, you can't just nod your head. You have to speak up so the reporter can hear you.

A. Yes.
Q. How big is a large aquatic bug?
A. Oh, possibly up to three-quarters of an inch long, something like that.
Q. Largest?
A. What?
Q. Is that the largest you know of?
A. Well, approximately.
Q. Well, might they go an inch?
A. Yes.
Q. Might they go an inch and a half?
A. Well, that would be pretty extreme.
Q. I don't care about that, sir. Doctor, let's say an extreme one, would an extreme one go an inch and a half?
[fol. 639] A. Not over an inch and a half.
Q. Well, we have got an inch and a half, anyway, for the limit, haven't we?
A. Yes.
Q. Hard-shelled?
A. Some of them.
Q. They crawl?
A. Do what?

Q. Do they crawl?

A. No, you wouldn't call it crawling. They swim or they fly.

Q. What do they do when they get on land?

A. Well, what I am saying is they don't naturally crawl. They—

Q. I know that, Doctor. Can they crawl?

A. Well, very feebly, let's put it that way.

Q. They do crawl?

A. Yes, very feebly.

Q. What do you mean by feeble?

A. Well, since their normal habit is to swim or to fly, naturally they are not going to do much crawling.

Q. Much, but they do crawl, is that a fair statement?

A. Yes, very feeble, that's right.

Q. Do they call them giant water bugs?

A. Beg pardon?

[fol. 640] Q. Do they call them giant water bugs?

A. Giant water bugs is one type. But it is really a giant water beetle that you are talking of.

Q. Can their bite produce a painful swelling?

A. They don't normally bite.

Q. Sir, Doctor, I am going to read the question back to you and see if you can answer that. Read the question.

(Following question was read by the reporter:)

"Can their bite produce a painful swelling?"

Mr. Leasure: I think I will object. The question assumes that they do bite. That is not established as yet.

The Court: Well, the doctor can answer that.

Mr. Leasure: If he is asked, he can. He hasn't been asked yet.

The Court: I think the question entails, also, the question as to whether or not the bug can bite. The doctor may answer.

A. Well, I can only answer it this way, that if I were to take a giant water bug, or one of the water beetles, which is approximately the same size, into my hand, say, and attempt to crush it, I would probably get a bite, I would think I would.

In other words, I wouldn't normally do such a thing. [fol. 641] It isn't an insect that normally bites a person.

Q. Well, let's forget the normal for the moment, and go into the question of do they bite at times?

A. They could bite under provocation.

Q. You would have to tease them?

Mr. Leasure: Objection.

A. I can't imagine myself teasing them.

Mr. Leasure: I object unless we know what he means by tease.

Mr. Dudnik: You tell me what I mean by tease. I don't know a thing about this subject, and I am just crawling myself, Mr. Leasure.

Mr. Leasure: I can't tell you, and I don't think you don't know yourself. You are just using dramatic language.

Mr. Dudnik: I don't think it is dramatic at all. I am just trying a lawsuit. Read the question. (Last question read by the reporter.)

The Court: I think the Doctor knows what the word tease means. He may answer if he can.

A. I can't imagine anybody teasing an insect, that is what got me.

Q. All right, that answers that for me. I am satisfied. But crushing them might cause a bite?

A. Well, it might, I don't know.

[fol. 642] Q. Didn't you just tell me if you took one in your hand and tried to crush it, it might bite you?

A. I am saying exactly that, nothing more.

Q. Fine, that is what I want to know. Well, you have been asked to assume some things, some hypothetical questions.

I am going to ask you to assume that a man felt a bug under his pant leg, and crushed it hard enough so that it would pop, would that be sufficient to cause it to bite?

A. What does this term pop mean?

Q. Breaks the top, whatever it is, the shell or whatever it is.

Mr. Hadden: Your Honor, I will object to the question. The evidence doesn't show any such thing. It shows a bite and then a squeeze or a pop or whatever it is.

The Court: Of course, my memory is as bad as anybody else's. The testimony was that there was a bite, that there was a squeeze, that there was—the language that was used, it was a pop.

Mr. Hadden: That is exactly the sequence of it, and the question assumes a different sequence.

The Court: Will you rephrase the question, Mr. Dudnik?

[fol. 643] Mr. Dudnik: I will withdraw it, your Honor.

Q. I have a little book here, Doctor. Are you familiar with Herbert Zim of the College of Education, University of Illinois, and Educational Consultant to the U. S. Fish and Wild Life Service?

A. What is the last name?

Q. Zim, Z-i-m. Ever heard of him?

A. Z-i-m? I don't know the gentleman.

Q. Beg pardon?

A. I do not know him.

Q. Well, do you know of a Clarence Cottam, Ph.D., Assistant Director of U. S. Fish and Wild Life?

A. He is a personal friend of mine.

Q. Well, is he an authority?

A. In his field.

Q. Is he an entomologist?

A. I wouldn't say so.

Q. Is he an authority on water bugs?

A. He is an authority on fish and wild life.

Q. Is he an authority on water bugs?

A. No, sir.

Q. I am going to read you a statement and ask you if you agree with it or not.

Mr. Hadden: Objection, your Honor, my reasons for [fol. 644] objecting are apparent, I think.

The Court: May I see counsel?

(Court and counsel conferred at bench.)

The Court: Let's hear the question.

Q. I am going to ask you, Doctor, whether you agree with this statement—

Mr. Leasure: Are we going to a new question?

The Court: I don't think we got into a question. If there was—let me ask, if there is a question are you withdrawing it?

Mr. Dudnik: I am withdrawing it, your Honor.

Q. I am going to ask you, Doctor, whether you agree with this statement:

"Aquatic bugs are found in nearly every pond and stream. A few species are marine, also. All are remarkable for their adaptations to life on or below the surface. Nearly all are predaceous, attacking other insects, snails, small fish, and so forth. In turn these insects are food for larger fish and water birds.

"The water striders, taking advantage of surface tension on water, stay on the surface without breaking through. They skate along with remarkable speed.

"Other water bugs spend most of their time under the [fol. 645] water. Some carry down air on the surface of their bodies and use this for respiration. Other species breathe air that is dissolved in the water.

"In most cases the young resemble the adults and mature after a series of nymphal stages.

"The water-boatmen have an erratic swimming pattern. The back swimmers, as their name indicates, swim on their backs, but can also fly.

"The giant water bugs, sometimes two inches or more in length, prefer quiet water. Since their bite can produce a painful swelling, the amateur collector should exercise caution. When abundant these giant water bugs are harmful in fish hatcheries."

Now, I am merely going to ask you, Doctor, whether you agree or disagree with the statement I just read to you.

Mr. Leasure: Your Honor, may we have the title from which you are reading, and the page?

Mr. Dudnik: Yes. 225 Species in Full Color. Insects. A Guide to Familiar American Insects. Herbert Zim-Clarence Cottam.

Mr. Leasure: What page?

Mr. Dudnik: I was reading from Page 48, and 49.

Mr. Hadden: Your Honor, we should like to preserve the objection we made at the bench and also to the passage [fol. 646] that was read. It refers to bites sustained only by those collecting insects, and there is no evidence of any kind in this situation that anybody was doing any insect collecting.

The Court: Objection overruled, and the doctor may answer.

A. Will you read the section about the bites or stings again?

Q. Yes, Doctor. "The giant water bugs, sometimes two inches or more in length, prefer quiet water. Since their bite can produce a painful swelling, the amateur collector should exercise caution."

And the last sentence is, "When abundant, these giant water bugs are harmful in fish hatcheries."

A. I agree with that perfectly, and what you say about using caution simply bears out what I already said to you about if you clutch them in your hand.

Q. Then, Doctor, do you say that you agree with this statement in toto, in full, as I read it?

A. That's right. It is a generally good statement.

Q. Now, Doctor, that type of bug is the one I asked you about when I first started to examine you called—it is an aquatic bug, is that right?

I am going to show you a picture of one of them, and [fol. 647] it says here, I believe, 2 and 2/10 inches in length; is that right?

A. Yes, that's about right. That is a mighty big one.

Q. Mighty big one. And in all your experience you have never seen such a big one, have you, Doctor?

A. That's about the limit you could expect, I would say.

Q. We go now better than a half inch more than your other limit, don't we, Doctor, than your first limit?

A. Well, possibly so.

Q. Beg pardon?

A. I said that one was large, that size was about it.

Q. Doctor, you I believe said that the largest you concede was about an inch and a half, is that right?

A. That is a good fair estimate.

Q. You now concede that they can be over two inches long?

A. No, sir. I simply concede that he says that bug is two and 2 [illegible] inches long.

Q. You do concede that, but you won't concede—

A. I concede that that photograph is labeled two and two-tenths inches.

Q. But you won't concede that there are any that long, Doctor, I take it, is that right, Doctor?

A. That's right.

Q. Now, you say in answer to Mr. Hadden's question, I believe you said there are only two insects, and they are [fol. 648] both mosquitoes, that are the only risk presented in this area?

The Court: Doctor, you will have to answer.

A. I said—

The Court: I am merely saying don't nod your head because the reporter must hear your answer.

Q. Is your answer yes?

A. The answer is yes, that there are only two species that might breed and be common in that area.

Q. You are now referring to species that are bred or born there, right, isn't that so?

A. Well, that is what you asked me.

Q. Of course, there are other species which could be brought in here which are not necessarily bred here, isn't that so?

A. Other species of mosquitoes?

Q. No. Other species of insects that would be a risk in this area.

Mr. Leasure: I object now. You are talking about two different things. The witness has been talking about mosquitoes. I don't know what Mr. Dudnik is talking about.

Mr. Dudnik: I am trying to find out—

The Court: I do understand Mr. Dudnik did say other [fol. 649] species and I think when you refer to species you probably mean species of what you have been talking about. I think Mr. Dudnik means other bugs or insects.

Q. Are there other bugs or types of insects that are not bred here but that could be brought in one way or another that would breed—

A. Mosquitoes?

Q. No. Insects, sir. We were stopped on mosquitoes. Now we are talking about insects, besides mosquitoes.

A. I don't understand your question. You said brought in there, what do you mean? You mean they flew in from the countryside or what?

Q. Say on a freight car with some Southern freight.

A. Well, there probably would be cases where the Inspection Service is such that they wouldn't pick them up. There might be.

Mr. Dudnik: I ask that the answer go out, your Honor.

The Court: The answer was not responsive, Doctor. Try to make your answer responsive to the question.

Mr. Dudnik: Read the question.

A. Read the question again to me.

Mr. Leasure: If your Honor please, he was asked if [fol. 650] certain species of something still undesignated could have come in here on a freight car.

The Court: The Doctor said something about inspection, and the answer is yes or no.

Mr. Leasure: Oh, no, he is entitled to explain his answer, please, your Honor.

Mr. Dudnik: The Court has ruled, sir.

The Court: Ask the question again.

Mr. Dudnik: I would like it read. I would like it read.

(Record was read by the reporter.)

Mr. Dudnik: Your Honor, that is the part, the inspection service, that I ask go out.

The Court: I don't think we have a complete enough answer to the question. I think perhaps, the objection was raised and the Doctor wasn't given a chance to complete. Had you completed the answer with that statement?

A. Well, I was uncertain as to what exactly he meant.

Q. Do you now know what I mean, Doctor?

A. I would say highly improbable.

Q. Why, Doctor?

A. Well, they just aren't transported about that way with the type of inspection service that the Federal Government [fol. 651] has. It is highly improbable that they would be introduced.

Q. Because you mean of proper inspection?

A. It is highly improbable they would be introduced.

Q. Now, were you ever with the Inspection Service?

A. Yes, sir.

Q. And when was that?

A. In my capacity as head of the Entomology Department in Delaware, I also had charge of the inspection.

Q. What do you mean by having charge of inspection, Doctor, in your service?

A. Administratively, I was in charge of the inspectors that did the inspecting.

Q. Did you inspect cars, sir?

A. I didn't have to. The inspectors did.

Q. Doctor, please, I asked you whether you inspected cars?

A. I did not.

Q. And where was that service that you performed?

A. In the state of Delaware.

Q. Delaware?

A. That's right.

Q. For what railroad?

A. The railroads that run through there. The Pennsylvania and the B & O.

Q. Thousands and thousands of cars?

A. That's right.

[fol. 652] Q. And there are hundreds and hundreds of cars coming into Ohio from the South, and other parts of the country, isn't that so?

A. That's right.

Q. Are you familiar with the inspection service in this area, in '54?

A. Well, I would say to that that it is the same type of inspection service they give in every state.

Mr. Dudnik: I ask that that answer be stricken and the jury be asked to disregard it. He is either familiar or he is not.

The Court: The answer will go out.

Mr. Leasure: If your Honor please—

The Court: The question calls for a specific answer, it deals with Ohio. The question at least deals with the state of Ohio. The question asked was are you familiar with the inspection service in the State of Ohio, as best I remember the question.

Mr. Leasure: But there still has been no showing that there is any difference between Delaware and Ohio.

Mr. Dudnik: I am not showing anything. I asked him.

The Court: He merely asked the question are you [fol. 653] familiar with the inspection service in the state of Ohio. He either was or wasn't.

A. If you limit it that way, I have no understanding of it in Ohio.

Q. Not at all, Doctor?

A. That's right.

Q. So that you don't know how they inspect foreign cars, in what manner they do it, in Ohio, do you, Doctor, being unfamiliar?

A. Well, you can put it that way if you want to.

Q. I don't want to do anything, Doctor. I am asking you some questions.

Mr. Leasure: I think you do, Mr. Dudnik, and this is highly argumentative.

Mr. Dudnik: Let the witness answer. I will wait, I will wait until you tell him.

Mr. Leasure: Why don't you just be fair with the witness? It is highly argumentative.

The Court: We have been very calm here and we are not going to let any tempers flare up and we are going to conduct this trial according to the rules of evidence and procedure. The Court will rule on objections that are raised. Now, if counsel for the plaintiff wants to rephrase a question, the question may be asked. If counsel has an objec- [fol. 654] tion and raises the objection the Court will rule on the objection.

Mr. Dudnik: May I have the question read?

Mr. Leasure: I am objecting to this question.

The Court: Let's hear the question.

(Following was read by the reporter:)

"Question: So that you don't know how they inspect foreign cars, in what manner they do it, in Ohio, do you, Doctor, being unfamiliar?"

"Answer: Well, you can put it that way if you want to."

Mr. Dudnik: Is the question I asked a proper one, your Honor?

The Court: The question was asked and answered and it is a proper question, and it is the witness' answer.

Mr. Leasure: If your Honor please, it is the last part after the answer that I am objecting to.

Mr. Dudnik: Whatever it is I will withdraw it.

The Court: You are objecting to some statement made by counsel.

[fol. 655] Mr. Leasure: I am doing that, and I think there was a question on the end of it, as I heard it. Perhaps the reporter didn't hear it.

The Court: I think Mr. Dudnik has just stated he is withdrawing it.

Mr. Dudnik: Whatever it is, I will withdraw it. I don't remember what I said.

Q. So now I go back to the other question, Doctor, then, is it possible for certain other insects of species different than mosquitoes, not bred in this area, to be brought in on freight from other areas, that would be a risk as far as a bite or infection is concerned?

Mr. Leasure: Just a moment. I am objecting as to possibilities. We are dealing with probabilities only here. Anything is possible, I assume. It is argumentative certainly.

Mr. Dudnik: Your Honor, may I have the same time to answer him? Yesterday when this gentleman was cross-examining Dr. Ippolito, and the day before, he asked question after question on possible. There was no objection on my part, because on cross-examination it is proper, your Honor.

The Court: All right. I have heard both sides. The objection is overruled. The doctor will answer the question.

[fol. 656] A. Read the question.

(Last question read by the reporter.)

A. Yes.

Q. And that would be large insects and small insects, could it not?

Mr. Leasure: I object, your Honor, to the possibility.

The Court: He may answer.

A. Yes.

Q. And the same would be true from other areas, whether it be south or west or east of this area?

Mr. Leasure: Objection.

Q. Isn't that so, Doctor?

The Court: He may answer.

A. What other areas?

Q. We talked about the south, now I am talking about—

A. You are talking about others?

Q. Yes.

A. Yes, the answer is yes.

Q. Doctor, were you told the kind of freight that is switched in the area which you walked around the other day?

Mr. Leasure: I think I will object here.

A. Yes.

Mr. Leasure: Your Honor, apparently he is going into [fol. 657] a field which the Court knows has been stricken out. We are objecting not only as to the ground of possibility, but also relevancy.

The Court: The area that counsel agreed upon that the jury might see? Is that what you are speaking of?

Mr. Leasure: No, I am speaking of the specifications that have been stricken, your Honor, and no longer a subject of this lawsuit. I am objecting on the grounds of irrelevancy.

(Court and counsel conferred at the bench.)

Mr. Leasure: Is there a ruling on my objection, your Honor, for the record?

The Court: Yes, I am overruling the objection, and the Doctor may answer. I know I lost the question and the jury may have lost the question, so will the reporter read the last question?

(Last question read by the reporter.)

A. No.

Q. Doctor, if I am going out of your field, I don't mean to, and I am going to ask you a couple of questions. If you don't feel qualified to answer, believe me, I mean to make no reflection.

Mr. Hadden asked you to assume several things, one of which was a ditch or area with stagnant water, and dead, [fol. 658] decayed pigeons and rats; as an expert would you term that as an unclean area?

Mr. Leasure: I think I will object to that, your Honor; this floor is unclean, you could call it that, it hasn't been swept since last night probably.

Mr. Dudnik: Apparently Mr. Leasure is uncomfortable, he keeps on interrupting me.

Mr. Leasure: I just want fair questions put to the witness, that is all.

Mr. Dudnik: Your Honor, this is the basis for another question.

The Court: The Court is going to permit the witness to answer the question.

Mr. Dudnik: Can you answer that?

The Witness: Read that question.

(Last question read by the reporter.)

A. In so far as the pigeons and rats are concerned, yes.

Q. How about the stagnant water they are laying in?

A. No.

Q. You wouldn't call that unclean?

A. No, sir.

Q. But you would say that the dead animals are unclean?

A. Yes, sir.

Q. Now, as an expert can you tell me if an insect crawled [fol. 659] over any of those dead vermin that we talked about, would it carry some of the uncleanliness on itself away from those dead rats and pigeons?

Mr. Leasure: I hate to keep popping up, your Honor, but I am forced to, unless the word "unclean" and "uncleanliness" is defined here. Certainly it is a totally and grossly unfair question, because all of us may have different ideas of what is unclean.

Mr. Dudnik: Your Honor, I object to the speeches.

Mr. Leasure: Certainly it is unfair to the witness to require him to answer such a generalized question.

The Court: Counsel has raised an objection and the Court will rule on it. The objection is overruled. The Doctor will answer.

A. I answered.

The Court: This is another question, Doctor.

Mr. Dudnik: Read the question.

(Last question was read by the reporter.)

A. It could.

Q. And if an insect—if you can answer this as an expert you tell me—and if an insect which had the ability to bite [fol. 660] or sting, carrying some of that uncleanliness which it had picked up in that area going over the rats and pigeons, as I have asked you about, could it transmit that uncleanliness to a person it stung?

Mr. Leasure: Objection.

The Court: Objection overruled.

A. That is a difficult thing for me to answer technically.

Q. It is more difficult to answer than the other question before that?

A. That's right, that's right.

Q. Do you care to answer it?

A. I would be perfectly happy to answer it.

Q. Well, can you answer it?

A. Yes.

Q. Will you answer it?

A. If the insects were scavengers which were working on these dead bodies, and that is the only kind of insects attracted to them, they could carry some of this away.

Q. How about an insect—first, tell me what a scavenger is?

A. Well, a scavenger, there are several scavenger species, in fact a good many of them. But they are a type of beetles which are called burying beetles or carrying beetles, road beetles, and they make their living and live on dead animals, and that is their only interest whatsoever. They don't sting [fol. 661] and they don't bite.

Q. Do they bite anyone?

A. No.

Q. Then I don't think you understand—maybe you do and I don't understand you—my last question referring to an insect bite or sting, sir, would you like it read to you again?

A. Yes, but I don't get the point, because an insect that would sting wouldn't be on the dead animal.

Q. Do you now say there is no insect known to science that bites or stings that would crawl across a dead animal?

A. I would say that would be highly improbable.

Q. Is it possible?

Mr. Leasure: I object, your Honor.

The Court: He may answer.

A. Anything is possible.

Q. I am not taking about anything. I am talking about is that possible?

Mr. Leasure: Objection.

The Court: He may answer.

A. It could be.

Mr. Dudnik: I have no more questions, Doctor. Thank you very much.

[fol. 662] Redirect examination of Dr. Louis A. Stearns.

By Mr. Hadden:

Q. Doctor, I have one or two brief questions and I hope we can get through with you today so you can go home, as I know you are anxious to do.

The giant water bug that has been referred to, Dr. Stearns, in this book, what can you tell us about the habits of the giant water bug, and be as brief as you can, please.

A. Well, the giant water bug is a bug. It isn't a beetle, which means it doesn't have these high wing covers. It breeds in aquatic places, running stream of water, lays it eggs there. The young and the nymphs are predaceous. They live on other insects and small animal life in the water. When they pass through the last nymphal stage and become adults which are very much like the young, they fly about in the same area, and the only reason that you would find them in a municipal situation such as this, they are attracted to electric lights at night.

Q. Doctor, is it reasonable or logical to assume that a giant water bug such as you discussed would be likely to be attracted to human beings for any reason whatsoever?

A. No, indeed. They are predaceous.

Q. Doctor, recalling the hypothetical question which I asked you before Mr. Dudnik questioned you, as to an in- [fol. 663] sect going up the man's pant leg, do you have that question in mind, sir?

A. Yes.

Q. Would you regard it as likely or probable that a giant water bug would behave in the fashion supposed in that question?

A. I wouldn't say it is highly improbable. I would say it is almost impossible.

Q. You mentioned your experience with the Federal Insect Inspection Service, sir?

A. That's right.

Q. Do you know what the system of inspection is nation-wide, are you familiar with that through your experience?

A. With what?

Q. Are you familiar with nation-wide inspection system?

A. Yes.

Q. And you know how it is carried out?

A. That's right.

Q. What is the fact, sir, whether or not the system you followed is the same nation-wide?

A. As far as I know, federally, it is country-wide.

Q. And you have no reason to suppose that it is any different in Ohio than anywhere else?

Mr. Dudnik: Objection to that, your Honor.

Mr. Hadden: You went into it, Mr. Dudnik.

[fol. 664] Mr. Dudnik: Are you sure?

The Court: You are asking him to suppose. The objection will be sustained.

Mr. Hadden: I have no further questions, Doctor.

The Court: You may step down, Doctor.

The Court: Ladies and gentlemen of the jury, upon the adjournment of Court by the bailiff we will resume once more tomorrow morning at 9:15, with the admonition that you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon an adjournment was taken to 9:15 a.m., Friday, June 19, 1959, at which time the following proceedings were had:)

[fol. 665] Friday morning session, 9:15 a.m.,
June 19, 1959

Thereupon the Defendant, further to maintain the issues on his part to be maintained, called as a witness Encell C. Richardson, who, being first duly sworn, was examined and testified as follows:

Direct examination of Encell C. Richardson.

By Mr. Leasure:

Q. Will you state your name, please?

A. Encell C. Richardson.

Q. Where do you live?

A. 18911 Scottsdale Boulevard, Shaker Heights.

Q. And what is your occupation?

A. I am engineer and sewer designer for the City of Cleveland.

Q. How long have you been with the Engineering Department of the City of Cleveland?

A. 40 years.

Q. Pursuant to a subpoena have you appeared here this morning and brought with you certain records of your department?

A. Yes, sir.

Q. I will refer now to Defendant's Exhibit J, and ask you if that is one of the records that you brought with you?

A. It is.

Q. Will you tell us what it is?

[fol. 666] A. It is a map of the intercepting sewers in the Cuyahoga River Valley.

Q. Does it show the locations of the sewers that enter and flow into the Cuyahoga River?

A. It does.

Q. As of what date?

A. As of 1955.

Q. I see down here in the lower right-hand corner the notation "Revised November 15, 1955"?

A. Yes, sir.

Q. So that as I understand it—

A. The map was made in 1945.

Q. Originally made in 1945?

A. That's right.

Q. And brought up then to date to November of 1955? Is that correct?

A. That's correct.

Q. So, then, this map shows the conditions existing as of November 15, 1955, in so far as sewers and sewer connections are concerned?

A. That is correct.

Q. Now, what is the fact, Mr. Richardson, as to whether in August of 1954 there was raw sewage, untreated sewage, being dumped into the Cuyahoga River?

A. There was—all of the Cuyahoga River Valley within [fol. 667] the limits of the City of Cleveland, and beyond the City with the exception of two very small areas—

Q. Can you keep your voice up a little bit? I think the folks are having a little bit of trouble hearing you.

A. With the exception of an area around the Valley View Homes Housing Project. That is in the neighborhood of West Third Street and Mary Avenue, and the Parcel Post Building at the lakefront. With the exception of those two areas, all the sewage and industrial waste went directly into the Cuyahoga River.

Q. Without being treated?

A. Yes, sir.

Q. Now, by sewage you mean material that ordinarily flows through the sanitary sewers, that is coming from people's homes, toilets, and so forth?

A. The sewers in this area are combined sewers. They carry storm and sanitary both.

Q. Storm and sanitary?

A. Yes.

Mr. Dudnik: Storm and—

Mr. Leasure: Storm and sanitary, I think he said.

Q. So that the sewers that empty in the Cuyahoga River carry both drainage water and sewage?

A. That's correct.

[fol. 668] Q. Now, this is a rather lengthy map and I don't want to get bogged down into a lot of details here, because I don't understand it myself.

Will you tell us if there is something on the map, or some designation on the map that shows the locations where raw sewage was dumped into the Cuyahoga River as of November of 1955?

A. Yes, sir. All those black dots on the map along the river.

Q. Let's see if we can see what you mean. This, for example?

A. That's right.

Q. And this, for example?

A. That's right.

Q. And so on, clear to the top?

A. In addition to that creeks went right into the river.

Mr. Dudnik: Creeks went into the river?

A. Yes.

Q. What do you mean by that, how is that significant here?

A. A lot of sewers are connected with the creeks that run into the river.

Q. In other words, some sewers connected to the creeks, the creeks go into the river?

A. Yes.

Q. And those sewer outlets are not shown on this map?
[fol. 669] A. That's right.

Q. Now, you mentioned Valley View Homes. Does that show on this part of the map that I have here?

A. Yes.

Q. Where is that?

A. This area.

Q. I will hold my finger there.

A. No, here. These houses in here.

Q. All right. Take the stand again, Mr. Richardson. Do I understand then that when you referred to Valley View Homes you were referring to this area in here generally?

A. That's right.

Q. May I draw—I will use a red pencil if I have one—generally there?

A. That's right.

Q. You say that area was connected up with the sewer system that did not empty into the Cuyahoga River?

A. Yes, sir. We built a pumping station there.

Mr. Dudnik: Built a what?

A. Pumping station.

Q. Then you said something about the Post Office as not going into the river, that is, sewage from there not going into the river, did I understand you correctly?

A. Yes, sir. That is at the lakefront.

Q. I see a building marked Parcel Post Building; is that [fol. 670] what you are referring to here?

A. Yes, sir.

Q. All right, I will draw a red circle around there. Now, with the exception of those two areas, do I understand you to say that in August of 1954 all of the sewage and industrial waste from the Cuyahoga Valley were going into the Cuyahoga River?

A. That's correct.

Q. The sewage untreated?

A. Yes, sir.

Q. Now, just one other thing here.

Mr. Dudnik: Do you want me to hold it up?

Mr. Leasure: If you will just hold it up on the sides it will help.

Q. Mr. Richardson, will you follow my finger here, and I want to get up to the Columbus Road, Carter Road area here. I see a road marked Columbus Road here, Canal Road, and I see Carter Road. Do I have my finger about the right place?

A. Yes, sir.

Q. I think I will put a red circle around there.

Now, this map as I understand it, the top is north?

A. That's right.

Q. The bottom is south, and the shaded area here is the Cuyahoga River, is that correct?

[fol. 671] A. Yes, sir.

Q. —that I have my finger on here?

A. Yes.

Q. And in what direction is the flow of the Cuyahoga River as shown on the map?

A. To the north.

Q. To the north, all right. Then for purposes of clarity, Mr. Richardson, is it a fact that all of the raw sewage that was dumped into the Cuyahoga River in the areas shown on this map flowed to the north, and then dumped into Lake Erie?

A. That's right.

Q. Now, you were kind enough to bring one other map here which was marked Defendant's Exhibit K, and will you tell us what that is?

(Defendant's Exhibits J and K were marked for identification by the reporter.)

A. That is a reduction of the previous map. That shows the areas in color that are connected to the Cleveland sewage treatment works and no longer go into the Cuyahoga River.

Q. Now, I notice that you have different colors and you have dates shown with each colored area, is that correct?

A. Yes, sir.

Q. For example, I notice the green area down here bearing a date of September 16, 1954; what does that indicate?

[fol. 672] A. That is the date when we accepted the pumping station from a contractor that lifted the sewage from that area into the city sewer system.

Q. Does it mean that as of that date the sewage from this area stopped being dumped into the Cuyahoga River and started being pumped away?

A. That's right.

Q. To a sewage treatment works?

A. Yes, sir.

Q. Now, I see the yellow area here is bearing the date of 1958. Is the same true as to that?

A. Yes, sir, that is the Harshaw Chemical Company.

Q. I see this blue area bearing a date of 1942; is that the Valley View area that you showed us on this large map?

A. Yes, sir.

Q. The orange area here bearing a date of 1957, does that indicate that in 1957 the raw sewage from that area was stopped being dumped into the Cuyahoga River and started into other sewers?

A. Yes, sir.

Q. The green area here, 1959, is the same true as to that?

A. Yes, sir.

Q. The blue area, 1956, the same is true as to that, as of that date?

A. Yes, sir.

[fol. 673] Q. And the red area, 1953, is that the Post Office Building that you testified about before?

A. Yes, sir.

Q. Now, I notice here on this small map something that appears to be the Public Square, and this green area I am pointing to is just adjacent to that, it runs from there generally down to the Cuyahoga River; can you tell us what buildings in this general area here near the Public Square dump their raw sewage into the Cuyahoga River up to 1959?

A. The portion, the major portion of the Cleveland Union Terminal Building on the Public Square, and the Midland Building, Republic Building on Prospect Avenue, and the buildings along lower Superior Avenue, and the Sherwin-Williams Paint Company on Canal Road, and the Cleveland Illuminating Company Building on Canal Road.

Q. And other buildings generally in that area?

A. And the B & O Railroad station on Canal Road.

Q. Did the line carrying that sewage enter the Cuyahoga River at the point where I have my pencil here?

A. Yes, sir.

Q. As shown by the circle?

A. Yes, sir, that is Superior Street.

Q. Do you have any idea, Mr. Richardson, as to the volume of raw and untreated sewage that back in 1954 was being dumped into the Cuyahoga River every day?

[fol. 674] A. That is difficult to determine, sir.

Q. Can you give us any estimate on it?

A. It is a large amount.

Mr. Dudnik: Objection and ask that that answer go out.

Q. Can you give us any estimate?

Mr. Dudnik: Just a moment.

The Court: The last answer will go out.

Q. Can you give us any estimate on it?

A. No, sir.

Mr. Leasure: You may cross-examine.

Cross examination of Encell C. Richardson.

By Mr. Dudnik:

Q. Mr. Richardson, you have been the engineer of sewer design of the City of Cleveland for 40 years?

A. Yes, sir.

Q. This map that you brought doesn't state which sewers are blocked and which sewers are broken, does it?

A. As far as I know, none of them are blocked or broken.

Q. As far as you know?

A. Yes.

Q. Well, how would you know whether any of them are blocked?

A. We would receive complaints about it if there were.

[fol. 675] Q. Supposing there was a sewer and pipes leading from a sewer in the Columbus Road bridge area, this area where Mr. Leasure put a little circle around it, supposing that were blocked up and backing up and causing

a ditch alongside the tracks to be filled with water, would you know about it?

A. I might not know it personally, no, sir.

Q. And if it wasn't reported nobody in your department would know about it?

A. They go to the Sewer Maintenance Department.

Q. But if it wasn't reported nobody would know about it, would they?

A. No, sir.

Q. You do not know now whether a sewer and pipes leading from a sewer within a few feet of the Columbus Road bridge was blocked up 10 days ago, do you?

A. No, sir.

Q. You never heard of it?

A. No, sir.

Q. Now, you have been with the City of Cleveland for 40 years, and you have watched things change pretty much, haven't you?

A. Yes, sir.

Q. No matter what type of disposal system that industry uses, it has to pass I presume the Health Department of the City of Cleveland?

[fol. 676] A. No, sir, the State Board of Health.

Q. It has to pass the State Board of Health. So that before any industry was permitted to have its sewage dumped into the Cuyahoga River, it had to be approved by the State Board of Health, did it not?

A. You have to have a permit from the State Board of Health.

Q. Which means it has to be approved by the State Board of Health, doesn't it, sir?

A. You have to have a permit to continue it, yes, sir.

Q. All these things, the sewage disposal operations, are controlled by the Board of Health, are they not?

A. In the City of Cleveland.

Q. Beg pardon?

A. In the City of Cleveland, yes.

Q. And if it is a menace to health it wouldn't be permitted, sir?

Mr. Leasure: I think I will object unless the word "it" is identified.

Q. If the disposal of sewage that you described up until 1955 into the Cuyahoga River was a menace to health, it wouldn't be permitted, would it?

Mr. Leasure: I will object to that, your Honor.

The Court: What is the objection?

Mr. Leasure: The objection is, first, that it calls for a [fol. 677] conclusion, and secondly he started out talking about the sewer disposal system, which would indicate perhaps septic tanks or something like that. And now the question relates, as I understand it, to any dumping of sewage, untreated or otherwise.

The Court: May I hear the question?

(Question read by the reporter.)

Mr. Leasure: There is another ground. He is not shown to be qualified on that particular subject.

The Court: May I have the question again, please?

(Question again read by the reporter.)

Mr. Dudnik: If I may be heard for one moment, your Honor. This gentleman has already answered with regard to certain permits from the Health Department. It is obviously intended to establish through him that a condition existed which might produce the condition complained of in this case. And so the witness gave testimony to the effect that there was sewage, treated and untreated, dumped into the Cuyahoga River.

Now, having said that and having talked about permission of the Health Department, before certain things [fol. 678] can be done, I think I have the right to develop this thing further.

The Court: He may answer.

A. It would be permitted and has been permitted. The question of pollution of the Cuyahoga River is under the control of the Stream Pollution Board of the State of Ohio. They issue permits to continue the pollution.

Q. In other words, what Board did you say, sir?

A. The Stream Pollution Board.

Q. In other words, the Stream Pollution Board of the State of Ohio has to permit that operation before it can be done, is that right?

A. Correct.

Q. And that's the way to operate the city, isn't it?

A. They also permit the City of Cleveland to do it.

Q. Sure, it is done with approval, isn't it?

A. Yes, sir.

Q. And in other areas of Cleveland, sewage is disposed of in another manner, isn't it, whatever that manner may be, is that true?

A. I presume so.

Q. And that is done with approval, isn't it, sir?

A. Yes, sir.

Q. Now, this area which is shown in this map which includes the flats area—does it not?

[fol. 679] A. Yes.

Q. —you know that thousands of people work in that area, do they not?

A. That's right.

Q. They go to their work every day and back, do they not?

A. Yes, sir.

Q. In the very area that you talked about where this sewage is flowed, what was the word, dumped into the river, isn't that so?

A. Yes.

Mr. Dudnik: Thank you, Mr. Richardson.

Redirect examination of Encell C. Richardson.

By Mr. Leasure:

Q. Just a few more questions, Mr. Richardson. Let's go back to Defendant's Exhibit K.

You have already told us that that shows the areas that have been hooked into a sewer system.

Will you tell us when an area such as the one shown here in these different colors is connected, what then happens to the sewage, the raw sewage that comes from that area?

A. It goes to a pumping station and we pump it out of the Cuyahoga River Valley and connect it to a sewer that runs to the treatment plant.

Q. Then is this a fact, then, that in each of these colored [fol. 680] areas here, as of the date shown, the raw sewage instead of being any longer dumped into the Cuyahoga River untreated, goes into a sewer pipe system that pumps it out of the Valley and to a sewage treatment plant, is that correct?

A. That's correct, that's right.

Q. So that neither raw nor treated sewage gets into the Cuyahoga River any longer?

A. That's right.

Q. Now, does this map also show not only the areas where connections have been made to a pumping station, and a sewage treatment plant, but does it also show areas where you propose or perhaps presently have in process similar developments?

Mr. Dudnik: Objection.

A. It does.

The Court: He may answer.

Q. In time, Mr. Richardson, what will be the fact as to the raw sewage that arises in the Cuyahoga Valley, ultimately will it all be not dumped into the river and put into sewage treatment plants?

A. It will all be pumped out of the Cuyahoga River Valley except certain industrial wastes that are detrimental to the sewers themselves. Those will have to be treated individually by the industry.

Q. By industrial wastes you mean chemicals of some kind?

A. Yes.

[fol. 681] Q. Or matters of that kind which would hurt your sewage treatment plant?

A. Yes, sir.

Q. Then do I understand you that in time there will be no longer any raw sewage—

A. That's correct.

Q. —dumped into the Cuyahoga River?

A. That's correct.

Q. Can you tell us why such a program has been and is being undertaken, does it relate to health in any way?

A. It is being done by orders of the Stream Pollution Board of the State of Ohio.

Q. By orders of the Stream Pollution Board of the State of Ohio?

A. Yes, sir.

Q. Can you tell us approximately when the Stream Pollution Board of the State of Ohio first issued any order on this general subject pertaining to raw sewage in the Cuyahoga River?

A. (No answer.)

Q. Do you want to look at this map, will that help you?

A. Well, the Stream Pollution Board was created at a later date. Originally the orders came directly from the State Board of Health.

Q. I see.

[fol. 682] A. Those were the first orders.

Q. When did the first orders come from the State Board of Health?

A. Back in the 1930's.

Q. 1930's, is that when you first started planning on doing something about this?

A. Yes.

Q. And when did the State Pollution Board come into existence?

A. I think it was about 1940's.

Q. 1940's?

A. Yes.

Q. Then this program has continued under their direction and order?

A. Yes, sir, that's right.

Q. Do you know from your position in the sewer department of the City of Cleveland, that is, the engineering department having to do with sewers, whether the State Pollution Board has granted permits or whatever it is they grant—well, let me ask you this—I don't want to assume anything.

You said something in response to Mr. Dudnik's questions about some kind of permits being issued, did I understand you correctly, by the State Pollution Board?

A. Yes, sir.

Q. What kind of permits are those, what name do they have?

[fol. 683] A. It is a permit to continue pollution of the Cuyahoga River. It is an annual permit issued every year.

Q. To continue with pollution?

Mr. Dudnik: To continue?

A. Yes, sir.

Q. What does the word pollution mean?

A. The permit also describes certain improvements that have to be made within the year.

Q. Within the year?

A. In consummation of the general plan.

Q. In consummation of the general plan?

A. Yes.

Q. The general plan to remove all pollution in time?

A. Yes, sir.

Q. Is such a permit issued to the City of Cleveland each year?

A. Yes, sir.

Q. And is such a permit issued to each industry who may have a sewer dumping into the river?

A. Yes, sir.

Q. So is it fair to say that the State of Ohio is keeping a continuing check on this situation?

Mr. Dudnik: It is all leading, your Honor. Objection to the question.

Mr. Leasure: Well, strike it.

[fol. 684] Q. Do you have any estimate you can give us, Mr. Richardson, as to when this entire plan will be completed whereby sewage will no longer be dumped into the Cuyahoga River?

Mr. Dudnik: There is an objection, your Honor, because it is immaterial to the issues in this case.

Mr. Leasure: I am not so sure of that.

The Court: He may answer if he knows.

A. It depends on financing. About five million dollars worth of work to be done yet. As soon as the money is made available it will be completed.

Q. Does the fact, Mr. Richardson, that the State Pollution Board issues a permit to dump raw sewage into the Cuyahoga River, or to continue to dump it, does that fact mean that it is healthful?

Mr. Dudnik: Objection, your Honor.

Q. —to dump raw sewage into the Cuyahoga River?

Mr. Dudnik: Objection.

The Court: Objection sustained.

Mr. Leasure: It is just the reverse of the other question that was asked by Mr. Dudnik.

The Court: Well, apparently there was no objection at that time.

[fol. 685] Mr. Leasure: I certainly did object, your Honor.

Mr. Dudnik: Your Honor, I withdraw my objection.

Mr. Leasure: Will you read the question?

Mr. Dudnik: It is not the reverse of my question, your Honor. It is not the reverse. And this is direct and not cross. But I withdraw the objection.

(Question was read by the reporter.)

A. The answer is no.

Mr. Leasure: Thank you. That is all.

The Court: Anything further of this witness?

Mr. Dudnik: Yes, your Honor.

Recross examination of Encell C. Richardson.

By Mr. Dudnik:

Q. Sewage of any kind is not healthful, is it?

A. Certainly not.

Q. And in city life, the Government has to contend with sewage, doesn't it?

A. Yes, sir.

[fol. 686] Q. It is part of our everyday life, isn't it, sewage?

A. Yes, sir.

Q. And up until 1955 with the appropriate studies I suppose having been made, sewage was permitted to be dumped into the Cuyahoga River, isn't that so, sir?

A. No, sir. They corrected part of it in 1942.

Q. Beg pardon?

A. They corrected part of it in 1942.

Q. Yes, sure, because as we progress, as we get more scientific, we make improvements, do we not?

A. Yes.

Q. But it was permitted up until 1954, wasn't it, because I understand you to say that it had to come on orders of the Stream Pollution Board of the State of Ohio; so it was permitted, wasn't it, sir?

A. Yes.

Q. And it is still being permitted, sir, isn't it?

A. Under certain conditions.

Q. It is still being permitted, isn't it, sir?

A. (No response.)

Q. Can you answer that yes or no?

A. No, I can't answer it yes or no.

Q. All right, I will ask you another question. Are we still dumping sewage into the Cuyahoga River from some places?

A. Certainly.

[fol. 687] Q. And that is with the approval of the Pollution Board of the State of Ohio, isn't that so?

A. That's right.

Q. And it has been done for the 40 years that you have been connected with the City of Cleveland, hasn't it?

A. That's right.

Q. If there was a better way 40 years ago it would have been improved 40 years ago, I take it?

A. It would have been corrected years ago if they had finances to do it with.

Q. I see. And still it went on this way and now they are cutting it down here and there, are they not?

A. That's right.

Q. And people are walking around that area and working in that area all the time, are they not?

A. That's right.

Mr. Dudnik: Thank you, Mr. Richardson.

Recross examination of Encell C. Richardson.

By Mr. Leasure:

Q. Just one last question, Mr. Richardson. Is the City of Cleveland being permitted to continue to dump raw sewage in the Cuyahoga River on condition that they complete this program which in time will remove all such dumping?

A. That's right.

[fol. 688] Mr. Leasure: That is all.

Further cross examination of Encel C. Richardson.

By Mr. Dudnik:

Q. And that is because the City of Cleveland in its progress as a great industrial city is continually striving to improve conditions, isn't that so?

Mr. Leasure: Objection.

The Court: He may answer if he knows.

A. Yes.

Q. And isn't it because part of this program is due to the fact that they want to clean up Lake Erie?

A. That's right.

Q. For recreation purposes?

A. And health purposes.

Q. Because for all these years the sewage which was dumped into the Cuyahoga River went into Lake Erie, didn't it?

A. Yes, sir.

Q. And it went all along the north of the City of Cleveland, didn't it, sir?

A. No, I wouldn't say all along.

Q. How far?

A. It goes east after it gets out of the Cuyahoga River.

Q. Then it went all along the east side of the City of [fol. 689] Cleveland?

A. Yes.

Q. That sewage which you speak of, right?

A. That's right.

Q. How far, all the way past Euclid Beach, I suppose?
A. Yes.
Q. Is that a fair statement?
A. Well, probably as far as Gordon Park.
Q. Gordon Park. And that has been continuing for 40 years, hasn't it?
A. That's right.

Mr. Dudnik: Thank you, Mr. Richardson. Thank you very much.

Mr. Leasure: Thank you, Mr. Richardson. That is all.

The Court: You may step down.

[fol. 690] Thereupon, the Defendant, further to maintain the issues on its part to be maintained, called as a witness DR. JOHN H. DAVIS, who, being first duly sworn, was examined and testified as follows:

Direct examination of Dr. John H. Davis.

By Mr. Leasure:

Q. Will you tell us your name, please?
A. Doctor John H. Davis.
Q. Where do you live, Doctor Davis?
A. 2719 Wicklow Road, Cleveland 20.
Q. Are you a duly licensed physician and surgeon in the State of Ohio?
A. Yes, sir.
Q. Doctor, will you tell us briefly concerning your education and training in the field of medicine?
A. I graduated from medical school in 1948. I had most of my post-graduate training at University Hospitals in Cleveland. Diplomate of the American Board of Surgery, and presently on the staff of the University, and of the University Hospitals.
Q. Where is your office located, Doctor Davis?
A. In University Hospitals.
Q. On Adelbert Road in Cleveland?
A. Yes, sir.
[fol. 691] Q. Doctor, do you hold any titles there at the hospital?

A. I am Director of Surgical Research at the laboratories, and Director of Education for the National Defense program at Western Reserve, as well as senior instructor in surgery in the Department of Surgery. Those are the main ones.

Q. Have you had any experience in the Army relating to the medical field, Doctor, and if so tell us about that?

A. I was director of the Burn study section of the surgical research unit of the Army for some time, and also co-captain of the Army surgical research team in Korea.

This study was primarily—the burn study was in the study of burns, preparation for national disaster possibilities, and the studies in wounds were primarily to see what we could do for the care of wounded men.

Q. In your practice here in Cleveland, Doctor, do you specialize in any particular field?

A. I am diplomate of the Board of Surgery, but I do primarily vascular surgery, blood vessel surgery.

Q. Do you hold a particular position there at the University Hospitals in that field?

A. Yes, I am Chief of the Vascular Clinic and the Vascular Service.

Q. Will you tell us what cardio-vascular surgery is, and very briefly what it entails?

[fol. 692] A. Cardio-vascular means heart and blood vessels. My own particular interest is along the line of blood vessels. And this is a field that is relatively new and relatively just opening up in recent years.

Q. Are you a consultant anywhere, Doctor?

A. Yes, I am consultant in surgery to the Crile V. A. Hospital, to Highland View Hospital, and to Cleveland State Hospital.

Q. As well as being on the staff there at University Hospitals, I understand?

A. Yes.

Q. Have you or are you presently carrying on any research programs, Doctor?

A. Yes. I have been interested for a good many years in the problems of some of the responses to infection, as we see them, and I think in recent years most of my work has been along this line, although I have also been inter-

ested in metabolism or the body's response to any sort of disease or injury that may happen to it.

Q. Have you published any books or papers, Doctor?

A. Yes, I published some sixty odd papers.

Q. On what subjects, generally?

A. On the subjects of burns, vascular disease, infection, injury.

[fol. 693] Q. Doctor, at some time at the request of the Baltimore and Ohio Railroad, did you examine James Gallick?

A. Yes, sir.

Q. When was it you first saw him?

A. It seems to me it was in February of—'57 I believe, while he was at the Cleveland Clinic.

Q. At the Cleveland Clinic?

A. Yes.

Q. Will you tell us just briefly the nature and extent of your examination at that time?

A. Well, I was interested in seeing both the record of what had happened to the patient, and also the patient himself as to what was existent, and both the patient and the records were looked at, and studied at the time of the examination.

Q. You mean the records there at Cleveland Clinic, the hospital records?

A. Yes.

Q. Now, in connection with the case of Mr. Gallick, Doctor, have you at any time examined the complete hospital record at Marymount Hospital?

A. Yes, I have seen the hospital record from Marymount.

Q. The complete record?

A. I believe so.

Q. You have told us that you examined the Cleveland [fol. 694] Clinic record up to the date of your examination, which I believe was early in '57?

A. I think it was.

Q. Have you at any time since then examined the remainder of the hospital record at Cleveland Clinic on James Gallick?

A. Yes. I have seen I think it must have been, if I can

change that date. I think it must have been February of 1958.

The reason is I know I had the record reviewed up through February or March of '58, approximately.

Mr. Dudnik: You mean the original examination?

A. It must have been.

Mr. Dudnik: 2-58.

A. Yes, sir.

Q. Have you examined the hospital record from Highland View Hospital on James Gallick?

A. Yes, sir.

Q. As a matter of fact, Doctor, in your capacity as a consultant at Highland View, did you have occasion to have anything to do with the case of James Gallick since he has become a patient there?

A. Yes. I have seen him on several occasions out there at Highland View. We see all the difficult problems on rounds and he has been seen several times, and I have had actually [fol. 695] really nothing to do with his direct treatment, other than any advice I might have.

Q. Doctor, based on your examination of Mr. Gallick, your familiarity with his case since he has been at Highland View, in your capacity there as consultant, and further based upon the hospital records of Marymount, Cleveland Clinic, and Highland View; will you tell us whether or not the basic cause of Mr. Gallick's trouble has ever been found?

A. No, sir, I do not believe it has.

Q. Doctor, in the field of medicine, are there certain underlying conditions in the patient which have been found to produce the type of lesion or lesions that Mr. Gallick has?

Mr. Dudnik: Will you read that question?

(Question read by the reporter.)

A. There are diseases which produce underlying diseases which can produce lesions which look like those of Mr. Gallick's.

Q. Will you name some of those, Doctor, some of those diseases?

A. Well, we can see this with a patient with diabetes, or in a patient with a disease with a long term known as periarteritis nodosa. This means, it is an inflammatory reaction around the small blood vessels in the skin and many other [fol. 696] organs, and this can produce a picture of lesions which look like this.

There are other vascular diseases, blood vessel diseases which we do not know a great deal about. But, again, one can get skin breakdown and ulceration that looks like this. I think those are the main ones.

Q. What is the fact, Doctor, as to whether the doctors who have been active in Mr. Gallick's case, as indicated by the hospital records, have given him certain tests in an effort to identify the causative agent of his trouble?

A. They have, yes.

Q. I don't know whether the word tests is complete or not. What if anything other than tests have they done in an effort to locate the basic cause of his trouble, basic cause of his lesions I probably should say?

A. I think it is fair to say that almost everything has been done that we know how to do to try to get to the bottom of this.

Q. And what has been the net result of all of that?

A. We still don't know the cause of the trouble that Mr. Gallick has.

Q. Doctor, I would like to read to you a hypothetical question or present a hypothetical question to you.

But before doing that I want to ask you specifically in [fol. 697] the case of Mr. Gallick have tests and examinations or whatever else is necessary been done in an effort to locate any infectious disease that may be present in Mr. Gallick?

A. Yes, they have.

Q. What has been the net result of that?

A. Well, there has been no evidence of an infection. We have grown bacteria which are usually considered to be the cause of most of the infections we know about, from his wounds at every hospital and literally every time they were cultured.

These bacteria have varied tremendously in particular

types. There are many types of bacteria or germs. And on almost every culture these have varied.

Now, what this usually means to us is that these are surface contaminations. In other words, our skin, all of us have bacteria at all times on our skin. It is a normal thing and actually we couldn't get along without it, really.

While we have cultured bacteria from these wounds, we have never found a specific bacteria that would give or should give this picture that we see in Mr. Gallick.

Q. Then what is the fact, Doctor, as to whether any specific infection has been found which would account for his lesions and his trouble?

A. I think we have to say that no specific infection has been found which will account for this.

Q. Now, let's take just briefly and generally the matter [fol. 698] of diseases other than infections. Have examinations and tests been made in an attempt to locate any such conditions or diseases in that field that might account for Mr. Gallick's trouble?

A. Yes, sir. Again, many tests and examinations have been run to try to find or understand anything else that might be playing a role.

Q. What has been the net result of that?

A. Again, I think, in general, all these tests have been negative. We have not found an underlying condition, single condition, that we could pin down as to playing the role.

Q. Now, I want to present this hypothetical question to you, Doctor, and it will take me a few moments to read it.

I want to say before I start here, Doctor, that whatever facts I assume here are assumed solely and only for the purpose of this question.

* * * * * * *

[fol. 707] Q. Doctor, I want to say in the beginning that whatever facts I assume in this question are assumed solely and only for the purpose of the question and not otherwise.

Doctor, I want you to assume that James Gallick, a man who in August of 1954 was 53 years of age, and had no prior diseases with the exception of chicken pox.

That the only other mishaps he had were three or four

minor accidents before August of 1954, and he never had skin disease, skin eruptions, allergies, or any other illness of any kind.

That prior to 1954 while eating during an argument he swallowed something which caused him pain in his chest, and he called on a doctor who saw him I think once and perhaps twice from which he recovered.

Doctor, assume further that this man went to work for the B & O Railroad in 1944 as a brakeman and switchman; that all his life he has done hard manual work. The longest [fol. 708] job before that having been with the Hunkin-Conkey Construction Company in construction work.

That from 1950 to 1954 he worked very steadily on one job for the B & O Railroad known as the Downtown Number 2 job, which consisted of switching cars in the flats of Cleveland; that in that area there was a bridge known as the Columbus Road Bridge, which extended in an easterly and westerly direction, under which ran a single track or two rails which extended in a northerly and southerly direction.

That for many years before August 10th of 1954, there existed underneath the bridge a swamp or ditch area, which constantly contained water, in which were lying rats, dead rats, and dead pigeons, sometimes or most of the time between twenty and thirty in the stagnant water.

That in and around those dead rats and dead pigeons there crawled and flew bugs and insects of many kinds and description.

Assume further, Doctor, that farther down that river track, or to the south, there were areas where there were other dead rats and pigeons laying around, as well as farther up the bridge toward the north.

Assume further that the greatest concentration of dead rats and dead pigeons was in that water in the ditch which ran alongside one of the rails and was directly underneath the Columbus Road Bridge.

[fol. 709] Assume further, Doctor, that this was called to the attention of employees of the company on occasions.

Assume further, Doctor, that on occasions the road men or the track men had attempted to clean that area out, but without success.

Assume further, Doctor, that on approximately August 10th of 1954, the exact date being unknown, Jim Gallick had occasion to walk underneath the Columbus Avenue bridge from a southerly to a northerly direction; that he walked on the left side or the westerly side, or the opposite from where the ditch was which contained these vermin which I have spoken about; that between him and this ditch were these two rails of the single track.

That he stopped underneath the bridge for the purpose of determining where his engine was, and therefore in doing that instead of heading north as he was walking, he was then headed south.

And that as he was standing there for about thirty to 45 seconds he saw his engine, decided to continue to proceed underneath the bridge, had started, turned north again, made one or two steps in a northerly direction, when he felt a sting or bite behind his left thigh about four inches above the knee.

That he touched, grabbed it with his hand, an object with his hand, that he squeezed it, that he heard it, and [fol. 710] felt it pop; that he did not see it, but it was about the length of three of his fingers, and as big around as his little finger.

That after he squeezed it, and it popped, he felt it roll down the back of his pants leg.

Assume further, Doctor, that that bite or sting he continued to feel it, he was conscious of a pain there at all times until seven o'clock that evening, this having occurred approximately 3:30 in the afternoon, about one-half hour after he started his daily tour of duty.

That about seven o'clock, or four hours later, when he had his dinner, either shortly after or before, he lowered his pants in a dressing room of some kind, could not see this area where he felt the pain and where he was bitten, took some soap and water and washed it, continued, however, on his tour of duty until eleven o'clock that night.

Doctor, assume further at 11:00 or 11:30 when he came home he lowered his trousers and showed his wife the area where he felt this bite, which continued shall we say to bother him, or pain him, but not too great; that she described it to him as a raised area, red in appearance,

and I think a pink center or a white center, that it was small, that it gave neither him nor her any concern, that he washed it that day, that night, continued to work that day.

The next morning she saw it again and it appeared [fol. 711] slightly larger. It gave him nor her any concern, and he continued to work for some four or five or six or seven days, washing it and treating it himself.

That about six or seven days later, the area then appeared the size of a half a dollar, was raised and pink, with a head on it, that while he was taking a bath this area with the head on it broke open, and that then he went to see a doctor.

Assume further that the doctor saw this area, does not recall or has no record of whether he took a history of how it happened or not, gave Mr. Gallick an injection of penicillin with some ointment dressing, and told him to come back in a couple of days.

That he did come back in a couple of days, Doctor, when the body was again injected with penicillin, further dressing of some kind, and told to come back, which he did.

That he came back on some four or five occasions; the last occasion being, Doctor, I think September 7th of 1954.

That at that time the Doctor examined it and decided it was resisting treatment; that rather than improving it was getting worse, and recommended that he be hospitalized for further studies.

Assume further, Doctor, that following that recommendation Mr. Gallick did not go back to the doctor, but then went to see another doctor.

[fol. 712] Assume further that the second doctor saw him on September 16, 1954, for the first time. Mr. Gallick gave that doctor the history of an insect bite, and that doctor put him in the hospital, performed the work in the hospital as shown by the Marymount Hospital record, performed the operations and tests and other procedures shown in the Marymount records.

That Mr. Gallick was not getting better. That he was in the hospital some three months the first time, that he was gone home for about three weeks, came back and

stayed in Marymount Hospital some 14 or 15 months, during which time the second doctor treated him as described in the hospital record, and that during that time many other lesions occurred on his body.

Assume further, Doctor, that his condition was getting progressively worse; that the lesions in his leg were so deep that you could see the tendons and muscles, some of which were torn, that he had atrophy, and that the doctor sought consultation, and that all the medication and treatment that was given him did not improve the condition.

Assume further, Doctor, that shortly after his discharge from the hospital the second time he was no longer the second doctor's patient, and he thereupon entered the Cleveland Clinic as a patient of the Cleveland Clinic.

That the tests and treatment and procedures shown in the [fol. 713] Cleveland Clinic records were done as shown there.

That there were many operations performed at Cleveland Clinic as shown in said records, that he was there for some two years, from 1956 to 1958.

Assume further, Doctor, that after these operations at Cleveland Clinic, in May of 1957 one leg was amputated, and approximately a year later the other leg amputated.

Assume further, Doctor, that in July of 1958 he went directly from Cleveland Clinic to Highland View Hospital where he has been a patient ever since.

And assume further that since being a patient at Highland View, the tests and treatment and other procedures shown in the Highland View records have been performed.

Assume further, Doctor, that he was examined by the second doctor referred to this week, and that there was an area on his right arm which was necrotic, and which is described and which looked like some of the areas of infection he had while he was your patient.

Assume further, Doctor, that he is a hospital patient now and will be one, and is in a condition where he requires hospitalization.

Assume further, Doctor, that it is the second doctor's opinion, based upon his recent and very brief examination, that the right arm will have to be amputated.

Again, assume, Doctor, for purpose of this question that [fol. 714] Mr. Gallick was bitten or stung behind his left thigh at or about the time previously stated, and while at or near a place where there was stagnant water, dead rats, dead pigeons, and insects flying about as previously outlined.

Now, Doctor, assuming for the purpose of this question only that everything that I have given you in this hypothetical question is a fact, based on that and based upon your knowledge of the hospital records, and your observations of this man, do you have an opinion based on reasonable medical certainty as to whether or not there is a direct and proximate causal relationship between the ditch containing the water, stagnant water, the dead rats, the dead pigeons, the insects flying about it on that day, and his present condition, and you will answer the question yes or no. Do you or do you not have an opinion?

A. Yes, I have an opinion.

Q. Will you state your opinion?

A. My opinion would be that the stagnant water and the dead animals, rats and pigeons I believe you stated, have nothing to do probably with the disease picture that we have seen in Mr. Gallick.

Q. Will you explain your reasons for your opinion as you have expressed it, Doctor?

A. Well, while the dead animals and pool of water with which they are connected is not necessarily a pretty picture, [fol. 715] it is at the same time not one that I am at least aware that is able to invite any type of infection, or other diseases which could cause the picture we are seeing. In other words, dead animals can attract certain insects, but they don't ordinarily attract the insects that bite man. The same way with water, except for the mosquito, for example. The thing that bothers me in trying to answer this question, I believe, is the fact that there is no way that I can relate the picture that I see in Mr. Gallick to anything that is known to come from dead rats, dead pigeons and or a pool of water.

Q. Doctor, are there certain diseases known to exist in this part of the world or this part of the country which are recognized as coming from animals, either alive or dead?

A. Yes. We have several diseases that can come from animals, primarily living animals.

Q. Has there been found in Mr. Gallick any such conditions which are recognized as coming from either alive or dead animals?

A. No, there have not.

Q. Do you have certain diseases of man which you in the medical profession recognize as coming from the bites or stings of insects in this part of the world?

A. Yes, there are diseases that are rare in eastern United States. They do occur in this part of the world, in western United States.

[fol. 716] Q. Let's take—I don't know how far you want to go medically from Cleveland, but let's take the Cleveland area generally and Northern Ohio say.

A. These I think would be very rare diseases coming from insect bite.

Q. Well, are there certain diseases recognized as coming from insect bites in Northern Ohio?

A. I think I would have to say no, in the sense of diseases.

Q. Now, by diseases are you including infectious diseases as well as other kinds?

A. Yes.

Q. Now, are you telling us that as far as Northern Ohio is concerned, you don't call to mind any infectious disease which is deemed to come from the bite or sting of an insect?

Mr. Dudnik: Just a moment. Do you mind if I have that question read? Do you mind if I have that question read back?

Mr. Leasure: I don't care. Let me withdraw it and I will ask another one. It was a long one.

Mr. Dudnik: I didn't follow it too closely.

Mr. Leasure: It may not be too clear.

Q. Let me broaden the question. In the United States are there certain diseases of man which are recognized as [fol. 717] coming from the bites or stings of insects?

A. Yes, there are.

Q. In the case of Mr. Gallick, have or have not all such diseases been ruled out?

A. Yes, I think they have been eliminated, ruled out.

Q. And is there more than one manner in which a doctor may rule out a particular disease in a person, particularly an infectious disease?

A. Yes, we try to rule out diseases, and quite frequently this is the way we arrive at a diagnosis, even by ruling out other diseases. We try to rule them out by signs and symptoms that are well known to produce certain diseases, by finding a causative agent; in some cases a bacteria, or a virus, or an injury, or something like that.

Then by the various tests that we can do on blood, and X-rays, and electro-cardiograms, and all that, things that are used routinely.

Q. Then, Doctor, to cover both diseases coming from live or dead animals, and those coming from the bites and stings of insects, what is the fact in Mr. Gallick's case as to whether or not all such infectious diseases, whether from animals or insects have been ruled out, by either tests or symptoms?

A. Well, I think that the thing in my mind that is im- [fol. 718] portant is that we have never proven, unfortunately, what the cause of this is. And that, I think, tends to rule out in my mind, without finding the cause, and I am hard pressed to say anything ahead of that, really.

Q. Doctor, what do you say, what is the likelihood of Mr. Gallick's difficulty being caused by an unidentified micro-organism of some kind picked up at the beginning of his trouble?

A. Well, I think it is unlikely, but one has to say that while it doesn't seem likely we are going to find any new bacteria in the world, any new germs, one can never say we won't. This area has been worked over very thoroughly, and it seems what we are learning now is more about how they work, how bugs or bacteria or germs work, what they do, and so forth, rather than finding new ones. But one couldn't say, on the other hand, that there might be some agent as yet unknown.

Q. What do you think the likelihood of that is, however, Doctor?

A. I think it is unlikely only because I believe it is unlikely we will find any new startling bacteria as time goes on.

Q. Do you think you have pretty well found them all, at least?

A. I think we found them. I don't think we know what [fol. 719] they do.

Q. At least, you found them to the extent that you can recognize them when they are there?

A. Yes. To the tools that are available today, the electron microscope, I think the inanimate objects have been found.

Q. And have you found any such bacteria or microorganisms, or whatever you call them in the case of Mr. Gallick which would account for his trouble?

A. No, there is no—there is no single agent, bacteria, germ, that we could say causes this picture that we are seeing in Mr. Gallick. This is not at all typical of any organism which is common in this part of the world.

Q. Doctor, have you on occasions seen other patients with lesions that have similar appearance to those that Mr. Gallick has?

A. Yes, I have.

Q. I don't mean particularly to the extent that he has them, or the number that he has, but the appearance of the lesions themselves?

A. Yes, I have.

Q. In your experience, Doctor, have any such patients given a history of having been bitten by an insect and their trouble having started in that way?

A. No.

Q. At my request, Doctor, have you made some exami- [fol. 720] nation of medical literature on the subject of ulcers which have a similar appearance to Mr. Gallick's, to determine whether there are any reported cases in the medical literature that identify an insect bite as the beginning or the source of the trouble?

A. There are none that I ran across.

Q. Will you tell us briefly what the extent of the search that you made was, and approximately how many cases were reported?

A. Well, I looked up the more recent medical literature on this material over the last three or four years, partly limiting it to that because the interest in much of this type of problem has been extended in the last three or four years. While many of these things were studied by the German scientists at the turn of the century, I think it has been re-emphasized and a much closer look taken in the last few years, as our tools have developed in an attempt to understand some of these things.

And in searching that literature, which could in no way be interpreted as the world's literature, it is primarily the literature of the United States, I did not find any instances of this type of lesion as caused by a bug bite, insect bite.

Mr. Leasure: You may cross-examine.

[fol. 721] Cross examination of Dr. John H. Davis.

By Mr. Dudnik:

Q. Doctor, do you know that Dr. Carl Hammond examined Mr. Gallick, also, on behalf of the B & O Railroad?

A. Yes, sir.

Q. And did you talk with Dr. Carl Hammond?

A. No, sir.

Q. Did you confer with him?

A. No, sir.

Q. Have you been shown any letter that he wrote regarding Mr. Gallick?

A. Yes, I saw a letter regarding him.

Q. And in that letter did you read his comment, quote—

Mr. Leasure: I think I will object, your Honor. Just a moment. There is an objection.

Mr. Dudnik: He read the letter, your Honor. I can test his memory.

Mr. Leasure: I probably should have objected to that, too, but I didn't. I certainly am objecting to this. As I explained, Dr. Hammond is not able to be here himself. If he were either side would call him, of course, but it is important that the man speak for himself, not produce his knowledge through some other witness.

Mr. Dudnik: Your Honor, that has been said three times, [fol. 722] and I ask that the jury be instructed to disregard it.

The Court: If Dr. Hammond were available obviously he would be the best evidence.

The Court has permitted this witness to testify from records of the various hospitals dealing with the history of this patient. If he has other information coming from other sources than the hospital, the Court will permit the witness to testify.

Mr. Leasure: Note an exception.

Q. I am quoting the language from Dr. Hammond's letter. Did you read that: "It appears to this examiner that this chain of events can be fairly attributed to the insect bite especially since no other causative factor can be determined."

Did you recall seeing that?

A. Yes, sir.

Q. Do you agree with that? Do you agree with that statement, Doctor?

A. No.

Q. Thank you, Doctor. Doctor—

Mr. Leasure: May the doctor be permitted to explain? I think he was cut off there.

Mr. Dudnik: He answered my question, no he doesn't agree.

[fol. 723] Mr. Leasure: Did you want to add anything else, Doctor?

Mr. Dudnik: Just a moment.

The Court: You can take that up on redirect.

Mr. Leasure: Isn't the doctor to be permitted to complete his answer?

The Court: I didn't gather that the doctor—did you want to add something?

Mr. Leasure: He didn't have a chance.

The Court: —to it, yes or no?

The Witness: Yes.

The Court: I thought he had completed his answer.

Mr. Dudnik: The reason I stopped, your Honor, is not to stop the doctor, because he has a chance to answer for Mr. Leasure.

He answered that question yes or no that could be answered yes or no. But I will yield.

The Court: He may qualify his answer.

A. The only thing I want to say is that I can certainly see what the doctor meant, I think, in that there is no other cause found. But this is the very point that has plagued me right along. It doesn't, I wouldn't go so far as to say, [fol. 724] then, that the insect bite must be the cause. See, that is what bothers me.

Q. I follow you, Doctor. But the doctor did say no other cause, but he also in that letter said, "this chain of events can be fairly attributed to the insect bite."

Now, I ask you—

Mr. Leasure: Just a moment. Let's not take a phrase out of context here. Read it all.

Mr. Dudnik: I read the whole—I read it, your Honor, here it is. I will read it again.

The Court: Is that an entire paragraph that you read?

Mr. Dudnik: Yes.

Mr. Leasure: It is a part of a sentence, your Honor. He takes part of the sentence and leaves the rest.

The Court: Re-read the entire sentence.

Q. I will re-read it and then I am going to break it down. I am going to re-read it again, the entire sentence as I read it before, Doctor.

"It appears to this examiner that this chain of events can be fairly attributed to the insect bite, especially since no other causative factor can be ascribed."

[fol. 725] Now I have read it. Now I am going to ask you a question. You answered my question by saying you think you understood, or you interpreted what you thought the doctor meant because there were no other causative factors.

I say to you he also says, does he not, besides that that the chain of events can be fairly attributed to the insect bite. Do you agree that he says that?

A. I agree that he says that, yes.

Mr. Leasure: I object. It speaks for itself.

Mr. Dudnik: Your Honor, can't I cross-examine the witness?

Mr. Leasure: I can object, too, and I am objecting.

The Court: Objection overruled. Proceed.

Mr. Dudnik: Might I have the answer read?

Q. Did you answer that question?

A. Yes, I agree that he said that.

Q. Fine. You, however, do not agree with the doctor?

A. I qualified agreement with him.

Q. Now, Doctor, you were given some facts which came from the evidence in this case, and they were contained in a hypothetical question which was given to you by Mr. Leasure.

[fol. 726] Now, inasmuch as those facts came from the evidence, I ask you to assume them to be true. With that assumption—

Mr. Leasure: Just a moment. We are getting into this, this is argumentative, of course, and the time for argument is later. I am objecting to the preface which has just been stated. I think it should go out and the jury instructed to disregard it. If he wants to pose a question—

Mr. Dudnik: Can't I ask a question, your Honor, without—

The Court: You had not completed the question?

Mr. Dudnik: It is all one question, your Honor.

The Court: Had you completed the question?

Mr. Dudnik: I don't remember whether I completed it, your Honor. I just don't remember now.

The Court: Let's go back to the start of that last question.

(Last question was read by the reporter.)

Mr. Dudnik: No, I am not finished.

The Court: Complete your question.

Q. With that assumption, Doctor, we know, do we not, [fol. 727] that Mr. Gallick had no previous diseases or illnesses except chicken pox, we have that, do we not?

A. No, sir.

Q. Well, where is it any different?

A. Well, if I interpret you correctly, you say we know he had no previous diseases?

Q. Yes.

A. We don't really know that, I don't think, I mean I am talking medically now, unfortunately, but to me, as I gather, he was not actually examined for some period of time. So I don't think I can say he had no previous diseases.

Q. Then I want to be absolutely correct and follow the facts and I am not going to do this again, read this question again—these people might jump out of their seats—what you are asked to assume is that he had no prior diseases with the exception of chicken pox. Now, I ask you to assume that.

A. All right.

Q. Now, with that assumption, we have a man who had no prior childhood diseases, with the exception of chicken pox, and a sprained ligament, is it fair to say that with that assumption that whatever started this man's trouble started with the sting or bite?

A. No, sir.

[fol. 728] Q. Is it fair to state, Doctor, that whatever started this man's trouble, started at the site, at the point where he was bitten or stung?

A. I am asked to assume he was stung?

Q. Yes.

A. All right. Yes, I think that is true.

Q. That is fair to assume, we agree on that?

A. Yes.

Q. And then from this bite which you are asked to assume, and from this little white or pink head spread the first ulcer, is that fair to state?

A. Yes.

Q. Which became larger and larger until it required some attention; is it fair to state that there is a relationship between—is it fair to assume, Doctor, that there is a relationship—withdraw that.

You, I believe, have checked all of the hospital records at the request of Mr. Leasure?

A. I believe so, yes, sir.

Q. Didn't you see in the Highland View records a diag-

nosis, either provisional or final, pyoderma-gangrenosa, secondary to insect bite?

Mr. Leasure: Which hospital record was this?

Mr. Dudnik: Marymount, I am sorry.

[fol. 729] Mr. Leasure: Marymount?

Mr. Dudnik: Yes. I am sorry.

A. Yes, sir.

Q. And that he was treated for some 15 months with that diagnosis?

Mr. Leasure: I object to that, your Honor. That diagnosis was not entered until he left Marymount Hospital.

Mr. Dudnik: Well, the doctor said yes, if—

The Court: The only thing I remember is that the doctor—

Mr. Leasure: It was entered when he left the second time.

Mr. Dudnik: Now, Mr. Leasure, this was when he just entered the hospital the second time, 15 months before he was discharged.

Mr. Leasure: All right, but it is the second entry, the second entry, not the first.

Q. He was treated for some 14 months following a diagnosis of pyoderma-gangrenosa, secondary to insect bite, isn't that so?

A. Yes.

Q. And the final diagnosis was the same, was it not, Doctor?

A. Yes, sir.

[fol. 730] Q. And that's when he left the hospital after a stay of some 14 months?

A. Yes.

Q. What is the meaning of secondary to insect bite?

A. Secondary usually means that it followed some previous difficulty. We say that certain things can happen after something else.

Q. In other words, then, do I take this to mean that the diagnosis, both provisional and final, was pyoderma-gangrenosa following an insect bite?

A. Yes, that's correct.

Q. Do you agree with that, Doctor?

A. Here, again, to me, I would say no. I do not, in a qualified way. I think pyoderma-gangrenosa is all right, which simply means death of skin. It is a descriptive term rather than meaning anything else. Whether or not it is caused by an insect bite, I think is still—I just would say I don't believe it is.

Q. Then you agree—will you disagree, then, with the diagnosis in the hospital. I mean with relation to the cause?

A. Yes.

Q. I know you agree with the term gangrenosa?

A. That's right.

Q. But you do not agree that it is secondary to an insect bite, is that correct, then?

[fol. 731] A. Yes, sir.

Q. You do not agree that it followed an insect bite?

A. I don't agree that I have medical evidence that it followed.

Q. No.

A. Because that's what I—you see, the only thing I have to go on is whether or not I have some medical proof. Theories I gather you are not interested in in the court room.

Q. No, but I am interested in probabilities, Doctor, and I am interested in—well, probabilities.

Now, would you say, then, that it is not probable that whatever he developed followed that insect bite?

Mr. Leasure: Just a moment. I think I will object unless the question is clarified whether he means followed simply in point of time, or followed in point of some medical causation.

Mr. Dudnik: If the doctor doesn't understand the question, I would be glad to rephrase it, your Honor. If he does, I would like an answer to the question.

A. Let me ask you one thing, in probable, again, probabilities bother medical people. Do you mean that it is at all possible, or that I believe that this happened?

Q. No, Doctor, probabilities may bother medical people, but that is what we go by in the law in trying cases. We go [fol. 732] by probabilities and not possibilities.

So with that explanation I wonder if the question that I

asked can be answered by you, and I am going to have it read, Doctor.

(Following question was read by the reporter:)

"But you do not agree that it is secondary to an insect bite, is that correct, then?"

A. Read it again.

(Same question was read by the reporter.)

A. I would answer that by saying that lack of evidence makes it not probable in my mind.

Q. In other words, you haven't enough evidence from what you already know and have been told, with regard to the bite and the immediate growth and progress, as you have been told and read it from the records, you haven't enough evidence to say that there is a probability that this trouble started with that bite?

A. I don't think I could say that there is a probability that it did.

Q. Is that because you haven't been able to diagnose his condition?

A. Yes, sir, because probability to me is a fairly strong term meaning I am pretty satisfied with it. The very fact that we never have pinned this down bothers me.

Q. Then I ask you this, Doctor, is it because you haven't [fol. 733] been able to diagnose whatever is wrong with him that you say it isn't probable that it started with that bite?

A. Yes.

Q. Now, do we agree, Doctor, that this is an infectious problem?

A. Again, I don't think I can agree it can, since we don't know what it is apparently.

Q. All right, Doctor. Certainly it is not a systemic condition?

A. Again, I can't say yes or no, in that it is not proven.

Q. You have ruled out—what systemic diseases are there that might or can produce these lesions, name them to me one at a time.

A. All right. Diabetes—

Q. Stop there. Did you rule out diabetes?

A. Yes, I think pretty well.

Q. What is the next one?

A. The next one is periarteritis nodosa.

Q. Is that a medical entity?

A. Yes, inflammation.

Q. Did you rule that out?

A. Yes, I think so.

Q. What is the next disease that would produce similar ulcers; systemic?

A. I think a hyper-allergic state. I am avoiding the word [fol. 734] disease because we know so little about it really. We call it a state rather than a disease. But a person who is hyper-allergic to certain things.

Q. Have you ruled out previous allergies?

A. Yes, previous allergies.

Q. Have you ruled out allergy, then?

A. No, sir.

Q. Then you say it may be an allergy, is that correct?

A. Yes, sir.

Q. Then is it fair to state that it may be an allergy that started with this bite or sting?

Mr. Leasure: I think I will object; it calls for a possibility.

Mr. Dudnik: Do you recall, your Honor, if I may say, on cross-examination of Dr. Ippolito and Dr. Anderson, Mr. Leasure posed many many questions on possibilities, and they were not attacked.

The Court: I am going to sustain the objection, and I want to say to the ladies and gentlemen of the jury that we have had a number of experts testify here. The Court now wishes to make clear to you, the jury, the law relative to issues of fact.

First, you the jury as the triers of issues of fact may [fol. 735] only determine probabilities; second, you may not arrive at the facts based on testimony as to mere possibilities. Third, the only testimony you may use in arriving at a verdict is testimony which relates to probabilities.

Therefore, at this time the Court instructs you to disregard all testimony based on possibilities, or what could have happened, and directs you to arrive at your verdict based only on a determination of probabilities.

Mr. Dudnik: Your Honor, may I ask whether that applies to anything these people remember that was asked by Mr. Leasure with relation to possibilities?

Mr. Leasure: No objection.

Mr. Dudnik: I will be going for a while yet, your Honor.

The Court: Well, at this time we will recess for the luncheon period, once more with the admonition that you do not talk to anyone about this case, not even amongst yourselves. You will return at 1:30.

(Thereupon a recess was taken.)

[fol. 736] Friday afternoon session, 1:30 p.m., June 19, 1959

Cross examination of Dr. John H. Davis, Resumed.

By Mr. Dudnik:

Q. Dr. Davis, you have ruled out diabetes, and then that long condition you talked about which you said was a medical entity, and you ruled that out, and you did not rule out, however, allergy, did you?

A. No, sir.

Q. Let's leave allergy out for the moment and go to the next disease which produces similar lesions that you know of?

A. I think these are the only diseases really that would do it commonly. There are perhaps some things that might do it much more rarely. Do you want those?

Q. Well, have those been ruled out?

A. I believe they have, yes, sir.

Q. Then is it fair to state that every known condition which produces similar lesions, with the exception of allergy have been ruled out?

A. Yes, sir.

Q. Now, you told us before that—unless I am mistaken—you told us before that he did not in your opinion have a prior allergy?

A. True.

Q. Is your opinion, Doctor, that simultaneously with this [fol. 737] insect sting or bite he developed an allergy?

A. Not simultaneous with, necessarily. Let me add here that this business of hyper-allergy, I think the jury should understand—

Q. Yes, surely.

A. —is a theoretical thing to a great degree that we are talking about today. We know so little except that we do know that patients—and I use the term simply to try to explain it—for example, you see the person who gets one boil after another; he is no different than you or I, as near as we can tell. So we say he is hyper-allergic to a particular organism that causes the boil, staphylococcae in this case.

Q. You mean staphylococcae in the boil?

A. In the boil, yes. This is really theoretical until we can prove eventually that this is true.

So I am talking in these terms when I use this term hyper-allergy. There is no single test that we could show that this exists. And yet such possibilities are I think definitely there. They are written about in the medical literature. This isn't only my theory, by any means. It is well established as a theory, not as a proven entity.

Q. Doctor, have you completed your answer?

A. Yes, sir.

Q. Now, Doctor, is it your opinion that this allergy that [fol. 738] you speak of, or hyper-allergy, is related to this bite?

A. I think I would have to answer that by saying that I believe the hyper-allergy is related to the condition as I have seen him. Again, until I know what causes the entire condition, all I think I can say is that it is related to the hyper-allergy—the hyper-allergy may be related to his present condition.

Q. Fine. I now are going to ask you consider the question again only because I want to see if you can answer my question; although I appreciate your last explanation I don't think it answers my question. If I am wrong we will try it again.

Mr. Dudnik: Would you read the question?

(Following question was read by the reporter:)

"Now, Doctor, is it your opinion that this allergy that you speak of, or hyper-allergy, is related to this bite?"

A. Do I have to make the assumption there is a bite?

Q. Yes, you do, Doctor.

A. Still?

Q. Yes, we are going to assume that he had a bite, yes.

A. The reason for my asking that is, again, medically I have no proof of a bite. But—

Q. Well, let's go back, then, let's hold that question for [fol. 739] a minute and develop that bite.

Mr. Dudnik: Mark that question; I may want to have you read it again.

Q. Now, Doctor, in your profession, diagnosis of course is an important factor?

A. Yes, sir.

Q. Diagnosis is made after history is obtained, is it not, Doctor?

A. Yes, sir.

Q. If you don't have a history, you are hampered in your diagnosis, I presume, is that a fair statement?

A. Yes, that is true.

Q. So that when a patient comes to you for treatment of some ailment, the first thing you ask him is "Tell me how you got it and where it first manifested itself, tell me about it"?

A. Yes, sir.

Q. Is that an important part of your diagnosis and treatment?

A. Yes, it is, but we don't always believe the story we get, even though it may fit.

Q. Have you any reason not to believe Jim Gallick?

A. No, sir.

Q. Then did you read the history in many places in several hospital records, Doctor?

[fol. 740] A. Did I read what?

Q. The history of the original bite in many places?

A. Yes.

Q. In all the hospital records?

A. Right.

Q. And they all give a history of an insect bite, do they not?

A. Yes, sir.

Q. Have you asked Mr. Gallick what happened before you examined him?

A. I believe I did.

Q. And did he tell you about the insect bite?

A. Yes.

Q. And I believe you said you had no reason to disbelieve him?

A. No reason to disbelieve him.

Q. Now, let's start with the insect bite, and will you read that question before, please?

(Following question was read by the reporter:)

"Now, Doctor, is it your opinion that this allergy that you speak of, or hyper-allergy, is related to this bite?"

A. No, it is not.

Q. Is it your opinion, Doctor, that this hyper-allergy [fol. 741] started after this bite?

A. I would believe it had to be present at the time of the bite, inasmuch as I don't know what starts it, I have to assume it is there.

Q. And that with a history that he had, no allergies before, Doctor, you still believe it had to be present before?

A. Yes, because—

Mr. Leasure: Just a moment. This question I think assumes something which certainly has not been established. He says with the history that he had no allergies before.

Mr. Dudnik: Rather than refer to the record, I will withdraw the question and put it another way.

Q. And that, Doctor, you believe although you have a history of only chickenpox at childhood, and no other diseases?

A. Yes.

Q. That being the case, Doctor, is it your opinion that the bite or the sting started a condition which he may have had before, which never in 53 years asserted itself, and produced the result that he has now?

A. The question is is it my opinion that this did cause the—

Q. Do you want the question read?

A. Please.

(Last question read by the reporter.)

[fol. 742] A. I think this is a possibility, yes.

Q. We are dealing with probabilities, Doctor, as the Court has said.

A. I think I would have to say that until I know the cause I cannot say that this is probable.

Q. Then you cannot answer the last question until you know more about the cause?

A. Correct.

Q. You are unable, then, as far as the questions I have asked you to enlighten us?

A. Yes, sir.

Q. Doctor, is a bite or sting from a bug a trauma?

A. Yes.

Q. What is the meaning of the word trauma?

A. I believe it means any injury.

Q. What is the meaning of the term local trauma?

A. Local trauma means that it happened in a locality on the body rather than to the whole body.

Q. An isolated area?

A. Isolated area.

Q. Is pyoderma used sometimes instead of pyoderma-gangrenosa?

A. Yes, it can be. They do not mean quite the same but they are used together.

Q. Do you have an opinion as to whether pyoderma can be caused by trauma?

[fol. 743] A. Yes, I think it can.

Q. When did you—Marshall suggests a question to me—is it one of the recognized causes of pyoderma-gangrenosa?

A. Well, yes, I think it is fair to say it would be a recognized cause.

Q. Doctor, how many times did you see Mr. Gallick altogether?

A. I am not sure, but I don't think it was more than five. I think it was some place around four or five times.

Q. When was the last time that you saw him?

A. It was in the spring of this year at Highland View. In March, I believe.

Q. The time before that, to your best recollection? You didn't bring your records, did you, Doctor?

A. No.

Q. Where are they, at your office?

A. Yes.

Q. The time before that that you saw him?

A. It was either late in '58, I believe, or early '59. In the winter sometime.

Q. From the time of late in '58 until the last time, was his condition about the same?

A. He is not here? He is not in the court room?

Q. No, he isn't. He is here, Doctor, but I didn't want him to—Mr. Leasure and I agreed that he wasn't going to be here during the medical testimony.

[fol. 744] A. Yes, I think during this time it was about the same—as a matter of fact, at that time I felt that maybe he was improving some.

Q. Would you say there was a slight improvement the last time you saw him, over the time you saw him late in '58?

A. Yes, I believe there was.

Q. So that the last time you saw him he looked or appeared in better shape than any of the times you saw him before?

A. Yes, sir.

Q. And the last time you saw him was this spring?

A. Yes.

Q. Doctor, in your profession do you know what we mean—I am sure you do, I am not talking medically—by the will to live?

A. Yes.

Q. As distinguished from a person who doesn't want to survive?

A. Yes.

Q. What does Jim have?

A. I think he has the will to live.

Q. That helps, doesn't it, Doctor?

A. I think to the best of our knowledge, it means a lot.

Q. Psychologically it is a wonderful factor, isn't it?

A. Yes.

Q. In keeping a man alive, isn't it?

[fol. 745] A. Yes.

Q. And from your experience, a man in his condition, as you saw him recently, that has the will to live, can live many years, can't he?

A. I don't know that I can say that. I will say that I think it helps an awful lot, over the will to die, as you have pointed out. But medically I don't know that I can say that part of it.

Q. Medically can you give no prognosis?

A. Medically I think we can give a prognosis.

Q. All right, what is your prognosis?

A. Well, as I say, this spring I felt that over a period of time, some months, I really felt that he was beginning to get better and actually I was originally asked to see him with the idea could I do anything for him. Like everybody else, I failed, too. I don't think anything I did made a bit of difference.

Now, I did feel, however, that he was improving, and I thought maybe this is running its course, maybe he is going to improve.

I have been in direct contact with the people at Highland View, because of my interest in this and several other chronic problems we have out there, and go out for conferences. And since that time he has again taken a dip downhill.

[fol. 746] Now it comes to prognosis, your question. In any patient who is slowly getting better over a period of time, the doctor generally assumes they are going to get better even though all sorts of things can happen. We are always frightened of a person who has recurrent episodes of improvement and then unfortunately seems to slip back some; because, again, talking in the broad generalities of things like will to live, and so forth, every one of these little episodes certainly is a little hard on the human machine. That is about all I can say about it.

So I am not quite as enthusiastic about his prognosis now as I was a few months ago. And I would have some misgivings as to whether his prognosis now is as good as I thought it was.

In other words, while I cannot say in terms of time for sure, the prognosis, I think when a doctor can he is usually kidding himself—I am unhappy that he has made this slip backwards under what we think is good care.

Q. Have you finished your answer?

A. Yes.

Q. Doctor, is it fair to state that you cannot tell us that he will not live the span that they say the Lord gives us, three score and ten?

A. I cannot say that he will not.

Mr. Dudnik: Thank you very much, Doctor.

[fol. 747] Redirect examination of Dr. John H. Davis

By Mr. Leasure:

Q. Doctor, although you say you cannot, what is your best opinion as to the likelihood of about how long he may be expected to live, in view of his present condition, and recent history?

A. Well, in view of the fact that this man has lost two legs over a period of time, and now apparently is going to lose an arm, without evidence that this disease is very much more under control than it was, and I would be very discouraged in thinking that it won't simply continue: again, we have nothing that we seem to have been able to stop this with, and it is for that reason I have no reason to suspect that it won't continue. But I cannot say.

Q. And if it does continue, that means what in terms of life expectancy?

A. Well, I think if this continues at this rate, I would say that probably he would not live more than another four or five years. In four or five years it has taken two legs and what looks like an arm.

Q. The best estimate would be four to five years?

Mr. Dudnik: Objection, your Honor. He didn't say that. That is leading and he didn't say that.

[fol. 748] The Court: The question will go out.

Q. Four to five years until what, Doctor? I don't follow you.

A. Well, I think that this disease may continue, and over a period of the next four or five years hit something vital which will take his life.

Q. Doctor, I want to get some data staked out and I think the best way to do it is to use the blackboard. Doctor, if you can help me, I would like to get in diagram form here the different categories of diseases or bodily conditions or whatever the proper term is, and I would like to start with infectious diseases, if I may, or could I shorten that to infections, would that be proper?

A. Yes, I think so.

Q. Would another category be non-infectious diseases?

A. Yes.

Q. Then what would be a third category, having had these two so far?

A. You could have the category of diseases which we know literally nothing about, which I put this hyper-allergic state into.

Q. Allergies, what term should we use?

A. Well, use the word allergy. I think it makes the most sense.

[fol. 749] Q. Now, Doctor, what is the fact, taking the category of infections, what is the fact as to whether or not infectious diseases have been ruled out in the case of Mr. Gallick?

A. I think the main thing, ruling them out, is the recurrent difference in the cultures that we have taken from the wound. This wound was an open wound, unfortunately, every time it was cultured, and that means that the cultures are essentially useless, because it only means that the bacteria there are surface bacteria, and doesn't tell us that they are the cause of the particular infection.

Q. What is the fact as to whether infections have been ruled out as the basic cause of his lesions?

A. I think the thing, again, I just said, it is ruled out because the first cultures taken were taken of an open lesion which had been open for some period of time, and reflect primarily what we call surface contamination.

Q. I am trying to find out, have infections been ruled out in his case as the basic cause?

A. I don't think I can say they have been ruled out. The only thing I can say is there is nothing to prove they are.

Q. All right. None have been found?

A. Right.

Q. Would that be a fair way to put it?

A. Yes.

Q. Now, how about non-infectious diseases, what is the [fol. 750] situation there in the case of Mr. Gallick, as to whether or not one of those is the basic cause, and I will let you express it in your own way. I don't know enough about it myself to give you a specific question on it.

A. Well, here again, I think, we have a patient who has been in three good hospitals, and has had all of the medical tests that multiple people are able to come up with, and while there is no positive thing in medicine, it is not an exact science, we have done I think everything that can be reasonably expected, and no non-infectious disease has been shown.

Q. All right, generally the same as infections.

A. Yes.

Q. Do I understand in the case of infections you have done what is known, and none have been found?

A. Yes.

Q. And that leaves you then with what, Doctor, in so far as categories of possible causes are concerned?

A. Well, in this grouping it leaves us with this allergic state.

Q. Now, Doctor, as things now stand, as the hospital records show, as you have obtained the knowledge you have first hand, as you have described it, do you have an opinion as to into what of these three categories the basic cause of Mr. Gallick's trouble most probably falls?

[fol. 751] A. I have an opinion that the allergy is playing a role in this.

Q. Getting down now to the matter of an insect bite, will you tell us whether or not you have an opinion as to whether Mr. Gallick's present condition would probably have come about whether he suffered an insect bite or not?

A. Since I believe--

Mr. Dudnik: Objection. It should be answered yes or no.

Mr. Leasure: The question is do you have an opinion.

The Court: The question is do you have an opinion, Doctor?

A. Yes, I have an opinion.

Q. Will you state your opinion, please?

A. Since I believe that the allergy may be playing a role, or is playing a role in the condition—will you rephrase that once more?

Mr. Leasure: Read it back again.

(Following question was read by the reporter:)

"Getting down now to the matter of an insect bite, will you tell us whether or not you have an opinion as to whether Mr. Gallick's present condition would probably have come about whether he suffered an insect bite or not?"

[fol. 752] A. Yes, in having an opinion, I believe his allergic state is playing some role here in this patient's condition. Therefore, I think this might well have happened with or without an insect bite.

Q. With or without an insect bite?

A. With or without.

Q. Doctor, can you tell us why it was that you were called in to consultation on Mr. Gallick's case at Highland View?

A. Well, yes, I can tell you why. As consultant there, we make rounds at specified times, and all interesting or difficult problem cases are seen by the surgeon who is at Highland View and the resident staff at Highland View, Nursing Service, and any other interested groups of ancillary medical services, and obviously Mr. Gallick was a challenge to everyone. And I was asked to see him both from the point of view of consultant and also from the point of view did I have any ideas that might help. And as I have already stated, unfortunately, I don't think that anything I added has made any difference either.

Q. Doctor, if we may turn for a moment to the subject of pigeons and rats, will you tell us based upon your ex-

perience and knowledge, what kind of bacteria you would expect to find either in or on the body of a live rat or pigeon in this area of Ohio?

[fol. 753] A. In general we find the same bacteria on animals that are found on humans, that is, there are certain groups of common skin or fur contaminations or bacteria living on skin and fur, on the floor and other places. These in general are the big groups that I think we might be interested in, would be the staphylococcae, the streptococcae, and the bacteria that is known as the colon bacillus, or escherichia, meaning it is primarily the bacteria from the human colon or the animal colon. These are common. There are many others, too, but most of them not nearly as important.

Q. Doctor, along the same line, would you expect to find generally the same kind of bacteria or a different kind of bacteria or a new kind of bacteria, on or in the body of a dead rat or pigeon, as distinguished from a live one?

A. In general, no. They would be the same, because the bacteria in the dead body in general comes from that body.

In other words, a few hours after death, the bacteria in the colon will spread through the body and on to the surface and the breakdown of the body.

Q. The bacteria that you have mentioned as ones you might expect to find on pigeons or rats, have they in the case of Mr. Gallick been ruled out as the basic causative agent?

A. They have been ruled out only in that they never have been found as the causative agent.

[fol. 754] Q. Have they been looked for as the causative agent?

A. Yes, they have.

Q. And were not found?

A. They were found, bacteria on dead animals have been found on subsequent open wounds, but unfortunately we don't know what was in the initial injury site.

Q. One last question. Are those bacteria that have been found in Mr. Gallick's ulcers the same kind or different kind than you will find on the live human body?

A. No, they are identical to the bacteria. You could culture these off anyone below the waist.

Q. Below the waist?

A. Well, there is a higher count below the waist, more of them.

Q. All right, on in the air, or under the fingernails?

A. Yes.

Mr. Leasure: That is all.

Recross examination of Dr. John H. Davis.

By Mr. Dudnik:

Q. Doctor, did I understand you to say that you find the same bacteria on live rats as you do on people, ordinary people?

A. As a general rule, yes. I am not saying that there couldn't be any other kind.

Q. Give us the others that you find on rats that you [fol. 755] don't find on people.

A. Well, it is possible to find something like—

Q. Doctor, probable, please.

A. Well, then, probable, no.

Q. None?

A. None.

Q. Then we today, all of us have the same bacteria and probably none other that you find in dead rats and dead pigeons in a stagnant ditch, is that your statement?

A. Yes, sir, I believe that is true.

Q. The same number?

A. No. I think you might well find a greater number in the dead animal, or even in a live animal, depending upon how he has been living. However, numbers per se are not too important.

Q. Numbers are not important?

A. They don't appear to be.

Q. Now, do you find the same bacteria in water, drinking water?

A. Interestingly enough, Cleveland drinking water is pretty sterile. It is quite an amazing thing.

Q. What water isn't sterile? I am talking about the same

bacteria that you find on people, do you find it in drinking water?

A. You can, yes, sir.

[fol. 756] Q. Is that a probability?

A. You mean is it probable that you can find the bacteria of people in drinking water?

Q. Is it a probability that you find the same bacteria in drinking water that you find in people that you are talking about?

A. No.

Q. Not a probability?

A. Not a probability.

Q. How about in Lake Erie water?

A. I don't think I know about Lake Erie water, I can't tell you. I can only guess there.

Q. Now, Doctor, let's assume that there was a bug, and let's assume that you were to take that bug and rub it over the face or neck of any person in this room, and take a bug of the same and similar species, and rub it over the dead rat or the dead pigeon that was in that pool or pond or swamp; you take the one bug that you rubbed over the person and inject its bite into one person, and take the bug that you rubbed over the rat, the dead rat, and inject it into the body of another person; which will more probably be infected, sir?

Mr. Leasure: Objection.

The Court: He may answer if he knows.

[fol. 757] A. I think it is more probable that neither would be, that this would be the same response in any experimental setup of a given individual.

Q. You will have the same response?

A. Yes, sir.

Q. And there would be no difference?

A. This is one of the horrible problems of infection today. May I elaborate on this a moment?

Q. Go ahead, Doctor.

A. Again, I think the jury, to the jury maybe some of my answers have appeared to be confusing—

Q. Doctor, the jury is not confused, and I don't think you should make that assumption. If you want to add to your

answer, you may. But I don't think you should assume that the jury is confused. I think they are intelligent.

Mr. Leasure: I think I will object to that.

Mr. Dudnik: You object to that statement?

Mr. Leasure: Yes.

The Court: Let's not get into the question about the jury. Doctor, refrain from referring to the jury.

A. I would like to point out that as we have studied the infection in humans, one of the very horrible parts of [fol. 758] trying to understand these diseases is that we can inject into so-called normal persons, or normal animals, tremendous quantities of bacteria; and literally produce no disease.

And we have to do all sorts of things, as we try to understand these diseases, to get the take of the infection.

I think this is why I make that statement, that in a so-called normal person, given the same bite to say me, on two different occasions, I would get the same response.

Q. The same response if you put those bugs in open wounds?

A. Yes, sir.

Q. He is your patient, isn't he?

A. Yes, sir, as a consultant.

Q. Doctor, is he your patient? Do you know what I mean by the word patient, Doctor? Is he your patient?

A. No, he is not.

Q. He is not your patient, all right. Doctor, when a person has a rash or breakout on the body, they go to an allergist and then he performs certain tests, does he not, to isolate that allergy?

A. Yes, sir.

Q. What tests were performed to isolate whatever allergy Mr. Gallick had?

A. None, because unfortunately we have no test for this type of hyper-allergic state. This is theoretical.

[fol. 759] Q. Theoretical. Now, if you had those dead rats and pigeons that were in that swamp that day that he was bit, you would have a basis for making tests for the allergy, would you not?

Mr. Leasure: I think I will object to this, your Honor, unless it is clearly stated an assumption that there were dead rats and pigeons.

Mr. Dudnik: It is, it is in your assumption, too.

The Court: It was stated in the hypothetical question put to the doctor.

Mr. Leasure: Yes, that's correct, but I did that this—

The Court: Do you want counsel to restate the assumption in his question?

Mr. Leasure: I ask that this question be made hypothetical, too, and not stated as a fact.

The Court: I assume counsel can rephrase the question.

Q. Doctor, we are going to assume that there were rats and pigeons, maybe twenty of them, dead, rotted, hides, in stagnant water on the day that Mr. Gallick was bitten by an insect that we will assume came from those rats and pigeons.

Now, you are talking about an allergy, Doctor; would [fol. 760] those specimens taken at that time help in determining if he was allergic to that?

A. No, sir.

Q. It would not?

A. No, sir.

Q. So that this is one allergy that medicine knows no way or no manner or way as to how to test for it?

A. Yes.

Q. I put that terribly but you know what I mean?

A. Yes, sir. This is a theoretical—

Q. You have answered my question, Doctor.

So far as we go here, we have no infection, none found?

A. None found.

Q. Then it is assumed you can say no infection?

A. Right.

Q. All right, we will cross that right out. We have non-infectious diseases?

A. None found.

Q. We are left with an allergy then, aren't we, Doctor?

A. Correct.

Q. An allergy that did not manifest itself before the day that he was bitten or stung by an insect?

A. Correct.

Q. And began to manifest itself immediately after that?

A. I think that is correct.

[fol. 761] Q. Now, just a couple of more questions, Doctor. This man has survived two amputations; after the second amputation, at least according to the hospital record that you have read, he was in better mental condition than before?

A. I think that is correct.

Q. Doctor, isn't it probable that having survived two amputations, he can survive another?

A. I believe he can survive an amputation, yes, sir.

Q. Doctor, is there a probability in this case that the remaining arm after the one that we talked about that will be amputated, may have to go?

A. Not probable at this time.

Q. Not probable. Is that because you think the disease has now or will by the time of the third amputation have been checked?

A. No, sir.

Q. On the basis of what has happened to this man, from the first amputation, and the second amputation, and the probability of the third amputation, do you say that it is not a probability that there will be a fourth one?

A. Yes, I say that there is not a probability.

Q. So that he will be probably a triple amputee, is that right?

A. At least that, yes.

Q. At least that. What is the worst, now that you have [fol. 762] given us the least?

A. I think this disease may go into internal organs. It doesn't have to go, for instance, to the other arm. It may go someplace else.

Q. But, Doctor, it has never yet hit an internal organ, has it?

A. I don't think we know.

Q. You know it has hit externally, don't you?

A. Yes.

Q. But you don't know that it has hit internally?

A. We don't know that it has.

Q. Have you made tests for it?

A. Yes.

Q. Has it?

A. Not by the tests.

Q. So that by the tests you have made, we can rule out, internal organs being attacked by this disease?

A. No, sir, we cannot.

Q. You won't rule them out?

A. No.

Q. But the manifestations have all been externally, have they not?

A. Yes, sir.

Q. And it has followed that course for five years, hasn't it?

[fol. 763] A. Yes, sir.

Q. Isn't it fair to state that the probability is that it will follow the same course externally?

A. Let me go back one minute in the record there. In your last statement I believe you said that there has been no internal manifestations.

Q. I thought you said so, too, but if you want—

A. I actually did. I recall to mind now the lesions this man had in his lung which were, again, never proven, whether they were this or not, but he did have a period of cavities in the right lower lobe of his lung, by the record, which subsequently cleared.

Q. They cleared?

A. Yes.

Q. But the external, eating away of the skin and the flesh never cleared?

A. That's correct.

Q. But the internal cleared?

A. Yes, sir.

Q. Then is it not a probability that it will continue to be external, and not internal, probability, Doctor?

A. I think if put that way I would say there is a probability.

Q. That it will continue to be external?

A. Yes, sir.

[fol. 764] Q. And having traveled to three limbs, is it not a probability that it will travel to the fourth limb?

A. No, sir, it still is not.

Mr. Dudnik: Thank you, Doctor.

Further Redirect examination of Dr. John H. Davis.

By Mr. Leasure:

Q. Doctor, is there anything in this case, based upon your knowledge of it, which shows that the assumed presence of dead rats and dead pigeons near where this happened played any part in causing Mr. Gallick's basic condition?

Mr. Dudnik: It has been asked and answered. But no objection.

The Court: He may answer.

A. There is no evidence, I don't think.

Mr. Leasure: Thank you, Doctor.

Mr. Dudnik: Thank you, Doctor, thank you very much.

The Court: Once more, the jury will recess for a brief period. You will return to the jury room, with the admonition that you do not discuss this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

[fol. 765] Thereupon, the defendant, further to maintain the issues on its part to be maintained, called as a witness Benedict Brodzinski, who, being first duly sworn, was examined and testified as follows:

Direct examination of Benedict Brodzinski.

By Mr. Hadden:

Q. Mr. Brodzinski, will you keep your voice up so we can all hear you.

Can we have your full name, sir?

A. Benedict Stanley Brodzinski.

Q. Where do you live?

A. 2498 West 8th Street.

Q. And the address which you have given us is in the City of Cleveland?

A. Yes, sir.

Q. Who do you work for?

A. Baltimore and Ohio Railroad.

Q. How long have you worked for the B & O?

A. Going on 17 years.

Q. What is your job then with the B & O during that period?

A. Well, Brakeman and foreman. At the present time, foreman.

Q. Where have you done your work for the B & O?

A. Mostly in the Cleveland yard.

Q. Mostly in the Cleveland yards?

[fol. 766] A. Cleveland yard. That takes in all of Cleveland.

Q. Have you ever worked, sir, on what is known as the downtown job or Seneca Street job?

A. Yes, sir.

Q. Can you give us an indication of when you held that job?

A. Well, I held that job I believe somewhere from around 1949 to about '52, as a foreman.

Previous to that as a brakeman, and I worked brakeman after that.

Q. Subsequent to 1952 did you ever work on that job since that time, since 1952?

A. Yes, I have worked down there on and off.

Q. Would that be by way of relief of other men who had a day off or something of that nature?

A. That's right, and then for about two years, relief job, working on Saturday and Sunday.

Q. Mr. Brodzinski, are you acquainted with the plaintiff in this case, Mr. Gallick?

A. I am.

Q. Do you recall ever having worked with him on the downtown job?

A. Well, I recall having worked with him one day.

Q. Was it only on one day or was it several times?

A. Well, I worked with him several times.

Q. Do you remember having worked with him on any [fol. 767] occasion during the month of August, 1954?

A. Well, to the best of my recollection, somewhere around there.

Q. You do recall an instance, was that one day during the month or more than one?

A. Just the one.

Q. On the occasion which you mentioned, can you recall any conversation which you had with Mr. Gallick?

A. Well, we were riding the gondola together—

Q. Just yes or no, do you remember the conversation?

A. Yes.

Q. Will you tell us where that took place, sir?

A. Well, going through Seneca Street yard to Whiskey Island.

Q. This was on a train, was it?

A. On a train.

Q. What sort of a train was it?

A. Well, a transfer, what they call.

Q. A transfer, is that some cars that are being moved from one place to another?

A. That's right.

Q. Where were the cars being taken?

A. To Whiskey Island, New York Central and Pennsylvania.

Mr. Dudnik: Your Honor, may I interrupt, may I interrupt for one second? I hate to interrupt but in as much [fol. 768] as there may be a necessity for rebuttal, may I bring Mr. Gallick in at this time?

The Court: The plaintiff is entitled to be in Court.

Mr. Hadden: May I go ahead now?

Mr. Dudnik: No, if you don't mind. I want Mr. Gallick to hear this testimony. I am sorry it didn't occur to me during the recess.

(Thereupon the plaintiff was brought into the court room.)

Mr. Dudnik: Thank you, your Honor.

By Mr. Hadden:

Q. When we were interrupted, Mr. Brodzinski, I understood you to say you were on a train moving to Whiskey Island. Do you recall what kind of a car you were in?

A. Yes, we were riding a gondola.

Q. You were with Mr. Gallick?

A. Yes.

Q. Anybody else there?

A. No, sir.

Q. Will you tell us, sir, in your own words to the best of your ability what the conversation was that you recall?

A. Well, we were riding the car and he was scratching his leg and he said that the previous day or so—he pulled up his pants leg and he showed it to me, he had a bite here, [fol. 769] an open sore.

Q. I see. This was while you were both riding in the car?

A. That's right.

Q. Was this conversation which you started or which he started?

A. No, he started. He told me he didn't know whether it was a bug or a sliver.

Mr. Dudnik: Beg pardon?

A. He didn't know whether it was a bug or a sliver from the car at that time.

Q. He showed you something on his leg, did he?

A. That's right.

Q. How did he do that?

A. Well, he pulled up his pants leg over here and to the best of my recollection it was somewhere over in here.

Q. Above his knee?

A. Yes.

Q. Whereabouts on his leg?

A. Somewhere in here.

Q. You are pointing to a little bit above your knee?

A. Above the knee.

Q. On the outside?

A. Yes.

Q. Of the right knee?

A. Of the right knee.

[fol. 770] Q. Now, you used some language to indicate what explanation he made to you about that. I wonder if you would repeat that so everybody can hear? I couldn't hear it very well.

A. Well, he said he didn't know himself whether it was a bug or a sliver from a car.

Q. From a car. Did he give you any further explanation?

A. No.

Q. Of what sort of a car he was talking about?

A. No, sir.

Q. Well, do you know if it was a railroad car or an automobile?

A. Yes, he was talking about a railroad car.

Q. Talking about a railroad car?

A. Yes.

Q. Was that the sum and substance of the conversation, or did you say anything to him at the time?

A. Well, I told him to go and see a doctor, or either get something put on it, so he wouldn't get no infection.

Q. If you can remember, Mr. Brodzinski, will you describe for us what it looked like that he showed you on his leg?

A. Well, like a good mosquito bite with the head scratched off and open right in the center, a little blood around it. It looked as though, you know, it was bleeding a little bit.

Q. Do you have any recollection, sir, when during the month of August this was that you had this discussion with him?

[fol. 771] A. No, I don't.

Q. Was that all the conversation that was had on that occasion about that subject?

A. That's all.

Q. Now, Mr. Brodzinski, have you at any time given Mr. Dudnik or any representative of his a statement about this matter?

A. I did.

Q. When was that?

A. Last Saturday.

Q. And to the best of your knowledge and belief, was what was put in the statement the same as what you told us today?

A. That's correct.

Mr. Hadden: Your witness.

Cross examination of Benedict Brodzinski.

By Mr. Dudnik:

Q. I am going to have that last question read to you and I want you to answer it again.

(Last question was read by the reporter.)

A. That's correct.

Q. You read the statement?

A. Yes, sir.

Q. And you signed it?

A. Yes, sir.

Q. And you wrote, "I have read this 4-page statement," did you not?

[fol. 772] A. Yes, sir.

Q. And it is the truth, is it not?

A. Yes.

Q. And you said it was the truth, did you not?

A. To the best of my knowledge, yes.

Q. To the best of your knowledge, and you had no trouble reading it, did you?

A. Yes, some places I did.

Q. Did you have trouble reading it some places?

A. That's right.

Q. What was the reason that you had trouble reading it in some places?

A. Well, the printing in there and the writing.

Q. The printing or the writing was hard to read; was there some of it you had trouble reading?

A. That's right.

Q. Now, sir, show me where that mark was that Jim Gallick showed you.

A. Somewhere around in here, to the best of my recollection.

Q. Stand up, please, sir. Let the jury see it. There?

A. That's right.

Q. You remember seeing that, of course?

A. Yes.

Q. You remember that distinctly, do you not?

A. I said to the best of my recollection. It has been so [fol. 773] long I didn't make a point to remember it.

Q. And you remember that it was the right leg, do you not?

A. I think it was, yes.

Q. When did you first talk to anybody about this case?

A. About two weeks ago.

Q. And who was the first man you talked to?

A. To Mr. Glenn from the Claim Department.

Q. Did you give him a statement then?

A. Yes, sir.

Q. Then who was the next person you talked to?

A. Well, the attorneys, the Baltimore and Ohio and Mr. Glenn.

Q. Did you give them a statement then?

A. I did.

Q. Was that two statements now you have given?

A. No, it was just going over the first statement what they took.

Q. Well, did you give them another statement is what I am asking about.

A. No, I don't think I had.

Q. Beg pardon?

A. I don't think I have. I believe—the same statement they took the first time, they read it over.

Q. They read it over to you?

A. Yes, they wanted to check to see whether I said all that.

Q. All right, when was the next time you talked to any-
[fol. 774] body else?

A. Well, a day or two before I talked to one of your attorneys.

Q. Where was this?

A. At the attorney's office.

Q. At what office?

A. In the Union Commerce Building.

Q. Was that the third time you talked to anybody about this?

A. That's correct.

Q. And all three times so far it is representatives of the Baltimore and Ohio Railroad, right?

A. Yes.

Q. When was the next time you talked to anybody about this?

A. The next time? Yesterday.

Q. And who did you talk to then?

A. Representative of the railroad.

Q. Who was it, one of these two lawyers?

A. The attorneys and Mr.—

Q. And Mr. Glenn, the Claim Agent?

A. That's correct.

Q. So you talked to them four times, did you not?

A. Correct.

Q. When was the next time you talked to anybody about it?

A. Today, right here, that's all.

Q. Well, how did I find you?

[fol. 775] A. I guess Mr. Cook told you about me.

Q. Right out on the railroad looking for witnesses, wasn't he?

A. That's right.

Q. Last week?

A. That's correct.

Q. And he was hanging around that yard looking for people who saw this accident, wasn't he?

A. I don't know what he was looking for.

Q. But he found you, didn't he?

A. Yes.

Q. And he asked you for your name and you gave it to him, is that correct?

A. That's correct.

Q. And then a man came out from my office to see you Saturday, didn't he?

A. No, he called me up Thursday and said he would be out Friday.

Q. Oh, was it Friday?

A. And he didn't come out Friday. He came out Saturday.

Q. He came out Saturday, and did you tell him the truth?

A. To the best of my knowledge I certainly did.

Q. Well, now—you don't have to know whether it is to the best of your knowledge, did you tell him the truth as you knew it?

[fol. 776] A. I told him the truth as I knew it.

Q. Now—

Mr. Leasure: May we see that?

Mr. Hadden: May we see that?

Mr. Dudnik: Yes.

(Plaintiff's Exhibit 25-A, B, C and D was marked for identification by the reporter.)

Q. Now, I am handing you four sheets of paper stapled together marked Plaintiff's Exhibits 25-A, 25-B, 25-C, and 25-D. The first page is 25-A, and I ask you to read this name.

A. Benedict Brodzinski.

Q. The second page is marked Exhibit 25-B and I ask you to read that name.

A. That is Benedict Brodzinski.

Q. Who signed this?

A. I did.

Q. That is 25-A; who signed 25-B?

A. I did.

Q. What is the name on 25-C?

A. Benedict Brodzinski.

Q. Who signed that?

A. Me.

Q. Now, I want you to read what is written on the side of Exhibit 25-D.

A. "I have read the 4 pages and are true."

[fol. 777] Q. Who wrote that?

A. I did.

Q. Who signed it?

A. I did.

Q. Then you read these four pages, did you not?

A. Well, quickly. I took it for granted that he put in there what I told him.

Q. I didn't ask you whether you took anything for granted. I asked you whether you read these four pages?

Mr. Leasure: I am going to object to that, your Honor. The witness has answered the question. Just because he doesn't like the answer is no reason—

Mr. Dudnik: I like the answer. I don't like your speeches but I like the answer.

Q. Now we will go back. You wrote this down yourself?

A. I did.

Q. "I read these four pages and are true"?

A. Yes.

Q. You meant that what you said in there was true, did you not?

A. Yes.

Q. And you meant by writing that that you read these four pages, did you not?

A. Like I answered once more, quickly.

[fol. 778] Q. Quickly?

A. Because he was there for two hours.

Q. He was there for two hours?

A. Yes.

Q. Were you asked first—when were you asked first how long he was there?

A. When was I asked first?

Q. Yes. Did Mr. Glenn or any gentleman ask you how long this man was in your house that came from my office?

A. No, sir.

Q. Now, you said some of it you may have had trouble reading?

A. Some of it I went over quickly.

Q. Do you see anything on this front page—and I don't want to stand in front of Mr. Leasure—that you would have trouble reading? Just look at it and tell me whether you would have any trouble reading it.

Do you have any trouble reading that, sir?

A. No.

Q. Will you start reading, and read until you have trouble, read it plainly so the jury can hear you.

A (Reading) My name is Benedict Brodzinski.

The Court: Speak a little louder.

A. I live at 2498 West 8th Street.

The Court: Just a minute. Can the juror way at the end of the jury box hear?

[fol. 779] Will you speak up loud enough so they can all hear you.

A. My phone number is Prospect 1-0728. I am married, have seven children. Three are married and four are still at home.

I am employed by the Baltimore and Ohio Railroad for the past 17 years, and have been foreman for the past 16.

I have been working around the Columbus Road bridge area since 1948, '49, on or about.

Mr. Leasure: Excuse me, your Honor. Has he been asked to read the whole thing?

Mr. Dudnik: Yes.

Mr. Leasure: Well, I am objecting to that, of course.

Mr. Dudnik: All right. Then we will read the part that is pertinent. We will read the part that is pertinent.

Q. I am going to mark a little check here where I want you to start reading, and I will mark it where I want you to stop.

Now, read from here to here, sir, will you, real loud so the jury can hear you.

A. Your Honor, may I say something on this before I read it?

Q. No, just a moment. You will have plenty of time, you can say all you want, but I want that read.

Mr. Leasure: Just a moment. Let's see what he has [fol. 780] been asked to read.

Mr. Dudnik: I have him for cross-examination.

The Court: You may see what has been marked out there for the witness to read.

Mr. Leasure: Where is the mark out there what you want him to read?

Mr. Dudnik: Surely, I want you to see it. I showed you the whole thing.

Mr. Leasure: On my request you did.

Mr. Dudnik: I am sorry, I got excited and lost my head.

Q. Read that part loud and clearly so the jury can hear you.

A. I have been working around the Columbus Road bridge area since 1948, '49. On or about August 1, 1954, I was working with Jim Gallick on second trick, and he mentioned to me that the previous day he was bitten by a bug and pulled up his pants leg and showed me his leg. It was itching him, and when I looked at it it looked like a mosquito bite with the top off, and the skin was broken from scratching. Open with some blood. You could see that it was flesh. He told me about it because it was bothering him. I told him to see a doctor or go to the drug store and put something on it.

Q. Now, without reading any more, read to yourself that whole statement and find in that statement anything that [fol. 781] says anything about a sliver.

Mr. Leasure: I think I will object to this, your Honor. The real question is whether this man told Mr. Dudnik's representative anything about it, not whether the representative put it in there or not.

The Court: The statement is before the Court. Counsel has requested the witness to read the statement, and certainly after the witness has read the statement counsel has a right to ask him any questions pertaining to the statement.

Now, as I understand it, counsel has asked the witness to read the statement?

Mr. Dudnik: Yes.

Mr. Leasure: We object.

The Court: Objection overruled. Read the statement, sir.

Q. When you have finished reading it, Mr. Brodzinski, let me know and then I will have a question or two to ask you.

Have you finished it?

A. Yes, sir.

Q. Is there anything in the 4 pages—

A. No, sir, there isn't.

Q. —about a sliver?

A. There isn't. He didn't put it in, because I gave him the [fol. 782] same statement. He asked me, he wanted the same statement that I gave the B & O attorney and the Claim Agent, and I told him the identical thing.

I was going over it fast and I thought he was putting it down. When I was signing it, I was reading it fast so he could get out. He didn't put it in there and it sure ain't my fault.

Q. In other words, Mr. Brodzinski, you notice that it isn't in there now, don't you?

A. I do.

Mr. Leasure: I think I will object to this, your Honor.

Mr. Dudnik: This is cross-examination. This is cross-examination, your Honor, I am entitled to cross-examine the witness, if the Court please.

The Court: He has answered that the word sliver is not in the statement.

Mr. Dudnik: I know, but now there is further questions I have to ask, if your Honor please.

The Court: You may proceed.

Mr. Dudnik: Read the question.

(Last question and answer were read by the reporter.)

Q. And you called it to my attention now and to everybody in this room, didn't you?

[fol. 783] A. That's right.

Q. Did you call it to the attention of the man who took your statement?

A. If I had noticed that when I was reading it—

Q. No, no, that isn't my question, sir.

Did you call it to the attention of the man from my office who took your statement?

A. I told him about it.

Q Did you call to his attention the fact that that wasn't in here?

A. No, I didn't.

Q. You did not?

A. I did not.

Q. You read it and you signed each page, and you signed the end, and you had no trouble reading this, did you?

A. No.

Q. And the sliver was out of there, as you see it is, but you made no mention of it to the man?

A. Well, I made a particular study for it now. At that time I didn't.

Q. You made a study for it now.

Mr. Dudnik: I offer this statement in evidence, if the Court please.

Mr. Hadden: Objection, your Honor. Only a certain portion of it is pertinent and that has been read to the jury, [fol. 784] and that is sufficient.

Mr. Leasure: We object to it further, your Honor, and at this time I would like to know the identity of this representative. I am giving consideration to subpoenaing him for our case to find out what is going on.

Mr. Dudnik: He is a very fine and capable lawyer who works for me.

Mr. Leasure: I'm sure he is capable for certain purposes.

Mr. Dudnik: And I would like to know the identity of some of your people.

The Court: All these are not part of the case.

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

Mr. Dudnik: Your Honor, if there is an objection to the statement I will withdraw it from the evidence. I withdraw it. I withdraw it but I will ask one or two more questions.

Q. Were there dead pigeons and rats under that bridge?

A. At that time, yes.

Q. At the time when he was bitten?

A. Well, I don't know when he was bitten positively.

Q. About the time?

[fol. 785] A. About the time, yes. We always see a few rats here or dead pigeons there.

Q. Under the bridge I am talking about.

A. There were some under the bridge, too.

Q. Is this a fair statement, with relation to the condition under the bridge at the time, about the time when Mr. Gallick—

A. Around the area of the bridge.

Q. I am going to read you and ask you if this is a fair statement.

Mr. Leasure: I think I will object, your Honor. This is not to impeach the witness' answers to the questions.

The Court: I don't know what the question is yet.

Mr. Leasure: Well, he is starting to read out of the statement. I am objecting. It is not relevant or material.

The Court: I don't know whether it is relevant or not.

Mr. Dudnik: Your Honor, the issue in this case is rats and stagnant water under a bridge.

The Court: I don't know what he is going to read yet. Mr. Dudnik, will you show Mr. Leasure what you are going to read?

[fol. 786] Mr. Dudnik: Yes, your Honor. This is what I am going to read.

Mr. Leasure: I am objecting because there is nothing inconsistent here with what he has testified to.

Mr. Dudnik: Your Honor, this is cross-examination. I would like to have your Honor see this.

The Court: I can't very well make a ruling until I see what it is.

May I see counsel a moment?

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

Mr. Dudnik: Does your Honor rule that it is repetitious?

The Court: Yes.

Mr. Dudnik: I withdraw the exhibit from evidence. I have nothing further.

Redirect examination of Benedict Brodzinski.

By Mr. Hadden:

Q. Just one or two questions. With respect to the pigeons and rats which you mentioned, did you ever at any time underneath that bridge or in that vicinity see as many as twenty or thirty dead rats or pigeons?

A. No, never.

[fol. 787] Q. Or anything approaching that?

A. No.

Mr. Hadden: That is all.

Mr. Dudnik: That is all. Thank you.

The Court: Ladies and gentlemen of the jury, I want you to start the weekend right. We are going to adjourn after the bailiff adjourns court for the weekend, and report back Monday morning at 9:15, once more with the admonition that you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon an adjournment was taken to 9:15 a.m., Monday, June 22, 1959, at which time the following proceedings were had:)

[fol. 788] Monday morning session, 9:15 a.m., June 22, 1959

Mr. Dudnik: If your Honor please, I subpoenaed Mr. Brodzinski back and ask leave to ask him a few more questions, which I had overlooked during my cross-examination on Friday, with leave of Court.

The Court: Without objection you may proceed.

Thereupon Benedict Brodzinski resumed the witness stand and was further examined and testified as follows:

Further cross examination of Benedict Brodzinski

By Mr. Dudnik:

Q. Mr. Brodzinski, you were on the stand Friday and I asked you several questions, particularly I asked you whether you had signed four pages, and you said you had?

A. Yes.

Q. Now, then, I didn't ask you or forgot to ask you whether or not your signature appears on three more places.

Now, I am handing you the third page of Plaintiff's Exhibit 25, which is 25-C, and ask you if your signature appears—

A. That's correct.

[fol. 789] Q. —where a word is crossed out?

A. That's correct.

Q. And a word written over it?

A. Yes.

Q. Then below that does your signature appear again where something is crossed out?

A. That's right.

Q. And at the bottom of the page on the last line does your signature appear again?

A. Yes.

Q. Now, Mr. Brodzinski, is it not a fact that after you read this statement you made some corrections and called them to the attention of Mr. Plevin, isn't that so?

A. That's correct.

Q. Did Mr. Plevin then make those changes by crossing out the words which you objected to and put in other words?

A. Yes.

Q. And did you then not sign at three places where you wanted changes made?

A. That's correct.

Q. Do you still say you read this in a hurry?

A. I certainly did.

Mr. Dudnik: I have no further questions.

A. The beginning of that statement—may I answer it?

[fol. 790] Q. Yes you may, sir.

A. I went over the top of it where my age and occupation, and so forth, and so on, and he questioned me of what did James Gallick tell me, or what was the conversation.

Well, I told him just exactly what it was. I took it for granted he had it in there. I skipped it over, and once in a while I would look at something else and I noticed them few things he had in there that I didn't specify in there. So he changed it.

Q. Now, then, you said you went over—you took something for granted, particularly when you related to him the conversation that you had with Mr. Gallick, and you

said you took that for granted, so you went over it hurriedly?

A. Well, not hurriedly, but I glanced over it.

Q. But when you went farther down you changed—well, here is one sentence, "On June 9, 1959, I was working this area and that pool of wate. was still there, although it hadn't rained for about a week"?

A. That's right.

Q. The word "about" is put in in place of another word. Do you remember what the other word was?

A. No, I don't. More, I think he had. More than a week.

Q. All right. You saw, then, apparently Mr. Plevin had said more than a week, when you meant to say for about a week?

[fol. 791] A. That's correct.

Q. You saw that?

A. Yes.

Q. And you called it to his attention?

A. Yes.

Q. And he crossed out the word "more" and put in "about"?

A. Yes.

Q. You had no trouble catching that, did you?

A. No.

Q. You had him add the term "it was seasonal," did you not?

A. That's correct.

Q. So that the sentence read, "There would always be a lot of bugs and insects there at that muddy stagnant pool, but it would get worse at times depending on the time of the year."

You wanted that something added there, you wanted the words "it was seasonal" added there, and he added it, didn't he?

A. Yes.

Q. And you signed the change?

A. Correct.

Q. You didn't go over that hurriedly then, did you?

A. Well, when you are glancing through you catch a word somewhere, you see it is not right, something I didn't say, he put in there.

[fol. 792] Q. So you called it to his attention. When it came to your attention whether he was bitten by a bug or scratched by a splinter, you didn't catch that in time to make the change, did you?

A. I did not, because—

Q. You may finish. I didn't want to stop you. Are you finished?

A. Just like I said, I had took it for granted that he had put in there what I told him to.

Mr. Dudnik: Thank you, Mr. Brodzinski. Thank you very much.

Mr. Hadden: That is all.

[fol. 793] Thereupon the defendant, further to maintain the issues on its part to be maintained, called as a witness Elmer Giese who, being first duly sworn, was examined and testified as follows:

Direct examination of Elmer Giese.

By Mr. Hadden:

Q. Mr. Giese, we have some questions for you, and I wonder if you will keep your voice up so everyone can hear you above the traffic noise.

Can I have your full name, sir?

A. Elmer Paul Giese.

Q. Who do you work for, Mr. Giese?

A. The Baltimore and Ohio Railroad.

Q. How long have you been with the B & O?

A. Going on 40 years.

Q. 40 years?

A. Yes.

Q. You don't look it. What is your present job with the B & O, Mr. Giese?

A. At the present time my occupation is yardmaster from 6:30 a.m. to 2:30 p.m.

Q. That is here in Cleveland?

A. Yes, sir.

Q. Back in August of 1954 was that your same job? Was your job the same?

[fol. 794] A. Yes, sir, I was working the same hours at that time.

Q. Where was your place of duty, did you have a particular place where you were supposed to work?

A. My particular reporting place was at Clark Avenue Yard.

Q. Clark Avenue Yard?

A. That is located underneath the Clark Avenue bridge.

Q. Mr. Giese, you are familiar, are you not, with the location of the Columbus Road bridge where it crosses the B & O tracks?

A. Yes, sir, I am.

Q. This Clark Avenue bridge which you speak of, where is that with reference to the Columbus Road bridge, what distance approximately?

A. Oh, I don't know just exact, but I think it is a distance of approximately 2½ to 3 miles.

Q. Some distance to the south?

A. It is some distance south or towards the lake.

Q. Mr. Giese, was there a time during the month of August of 1954—withdraw the question.

First of all, are you acquainted with the plaintiff in this case, Mr. James Gallick?

A. Yes, sir.

Q. Can you tell us when it was approximately that you first became acquainted with him?

A. Well, I don't know approximately the date of seniority, [fol. 795] but I worked with him in the vicinity of Clark Avenue Yard and Columbus Road Yard and Cleveland Terminal since he has been—

Q. When did that start?

A. Since he has been a brakeman.

Q. Well, it goes well—

A. I don't think it is '43 or '44, his date of seniority.

Q. Is it quite a bit of time?

A. Yes.

Q. Well in advance of 1954, isn't that so?

A. Yes.

Q. Now, sir, did there come a time in August of 1954 when you had occasion to talk with Mr. Gallick about any unusual incident which he claimed to have happened?

A. Well, we had a conversation, and it led into this—

Q. Before you tell us about the conversation, where did it take place?

A. It took place at Clark Avenue Yard, as far as I can remember.

Q. That was at your usual working place, was it?

A. That's right.

Q. How did the conversation start?

A. He had told me that he was doing some landscaping at the residence that he purchased in Parma, and he was working in shorts and no shirt, and it was warm weather [fol. 796] at the time, and he claims he had been bitten by a bug, and at the time he talked to me about it he said he was either bitten at home or at work.

Q. At the time—

A. At the time he told me about it, yes.

Q. He didn't appear to be too sure, is that right?

A. Well—

Mr. Dudnik: Objection. Just a moment, please.

Mr. Hadden: Withdraw it.

Q. Go ahead and finish up what he told you about the conversation during the course of this conversation.

A. Well, as far as I can remember, that was all of the conversation we had with the exception he said where do you live. And I says I live in Parma, and at that time I didn't even know that he had moved. I didn't know where his home was at the time, and he told me he had moved in Parma and he was doing this work.

And he said, "You live in Parma? Are you pestered with bugs?"

I said, "Oh, I don't think any more than anybody else on the street with the seasonal bugs that we have."

Q. Does that complete your answer, then, is that just about the sum and substance of it?

A. That completes, that completes the conversation as [fol. 797] far as I can recollect, and that completes my answer to your question.

Q. All right, thank you. Now, did there come a time following this occasion of which you have just spoken when you had another conversation with Mr. Gallick about the same subject, the same general subject?

A. Well, as far as I can recollect, I had another conversation with the gentlemen in this respect.

He says, "Elmer"—

Q. Before you tell us what was said on the second occasion, tell us what day it was, if you remember?

A. Well, I can't tell you what day it was.

Q. Do you remember how long following the first one?

A. As far as I can recollect, it was approximately 10 days or maybe two weeks after the first conversation I had with him.

Q. Where was the second conversation held?

A. In Clark Avenue Yard.

Q. Who started this conversation?

A. Well, we were just having a casual talk about different things, the way a person does when you are on the job, and he told me, he said, "Elmer, I remember now, I was bitten by a bug while switching cars at our Columbus Street freight house."

Q. Any other conversation about the same subject?

[fol. 798] A. Not that I can remember, no, I don't remember.

Q. Did he at any time indicate to you where on his body the supposed insect bite had taken place?

A. Well, he indicated to me that when he got this insect bite and slapped it, he said there was an insect that came out of his pant leg and fell on the ground.

Q. It was on his legs?

A. It was on his leg, yes.

Q. Are you able to recall at this time which of his two legs was indicated, if either was?

A. Well, he indicated on his right leg.

Q. That is, he made a gesture indicating?

A. Yes, he said he slapped the bug, and the bug went down through his pant leg.

Q. Is that just about all that you can recall of the second conversation, then? Anything more said?

A. That is all I can recall of the second conversation I had with him.

Q. Now, Mr. Giese, did there come a time following both of these conversations when you learned that he had laid off the job?

A. I just don't get your question.

Q. Well, there came a time, did there not, when he went to the hospital, are you aware of that?

A. Yes, I found out about that later on.

[fol. 799] Q. When was it that you first learned that he was sick?

A. Oh, it was approximately two months later I heard he was sick.

Q. What was there, sir, about these two conversations which caused you to remember them, if you can say?

A. Well, will you ask that again, sir?

Q. Yes. Maybe this will be an easier way to go about it. Did you learn at some later time when Mr. Gallick had gone to the hospital why he was in the hospital?

A. Well, about two months later I heard he had an infection and he was laying off of work.

Q. Did you ever learn, sir, that he had reported or that a report had been made to the railroad with regard to the way this infection started?

A. I heard a report had been made, yes.

Q. And what did you learn with regard to that report?

A. Well, I learned that the report was made out, that he had an infection and he was laying off and he was bit by a bug, and then it came to me the conversation I had with him.

Mr. Hadden: I think that is all.

Cross examination of Elmer Giese.

By Mr. Dudnik:

Q. Then you had two conversations with Mr. Gallick about a bug bite?

[fol. 800] A. Yes, sir.

Q. Now, I want you to do the best you can to tell me again what he said in the first conversation. First, before that—withdraw that.

When was the first conversation?

A. Well, the first conversation was some time in August he told me he was doing some—

Q. Of what year?

A. Of 1954.

Q. Can you try and give us as close to the date in August as it was?

A. No, I couldn't recollect any date because—

Q. The first of August, the 5th, the 10th, 15th, 25th, 30th?

A. I don't know. I think it was around, as far as I can recollect, it was around the middle of August.

Q. Around the middle, that would be around the 15th?

A. Yes.

Q. And that conversation was in your office?

A. It was in the vicinity of our Clark Avenue Yard.

Q. The Clark Avenue Yard is a good-sized yard, isn't it?

A. Well, it runs from Clark Avenue to what we term the west end. It is only a distance of about, oh, I would say about three-quarters of a mile.

Q. Is your office at one end of that three-quarter of a mile stretch?

[fol. 801] A. Yes, my office is underneath the Clark Avenue Bridge.

Q. Where with relation to your office was this conversation had?

A. As far as I can recollect, it was right at Clark Avenue, underneath the Clark Avenue bridge at the office.

Q. Underneath the Clark Avenue bridge, and what time?

A. Well, sir, I don't know what time it was. You have a casual conversation with somebody, and you wouldn't think of time.

Q. It is casual for you to remember which leg he slapped, is it?

A. Well, yes, absolutely it is.

Q. All right, then what time was it, sir, can you remember?

A. I couldn't pinpoint the time.

Q. Was it in the morning, 8:00 or 9:00 in the morning?

A. Oh, it could have been.

Q. It could have been?

A. That's true.

Q. Could it have been at night?

A. Well, it could have been at night. However, my hours at this particular time were from 6:30 to 2:30. Now, I might—

Q. You say it could have been at night, but your hours—

A. I might have doubled over some day, I don't know. I [fol. 802] might have worked 16 hours and he might have been working on a night trick, I wouldn't know that.

Q. It could have been at night or it could have been in the morning, is that right?

A. That's true, yes.

Q. I say, is that correct?

A. Yes.

Q. But you don't know which it was?

A. No, I wouldn't say what hour of the day it was.

Q. Now tell me what he said.

A. Well, as far as I can recollect, he told me he was working on some landscaping at his home that he purchased in Parma, and he was working in shorts and no shirt, and somewhere he had received a bug bite, either at home or at work. He didn't know at the particular time. He didn't pinpoint it down anyplace.

Q. You mean he told you he was working at home in his shorts and somewhere either at work or at home he got a bug bite?

A. Yes, that's true.

Q. Why would he tell you about working at home in his shorts and then talk about a bug bite at work, if you can explain it to me?

A. Well, I don't know. That's the way some of your casual conversations happen to go on among employees while you are on duty. You talk about your home life. You [fol. 803] talk about work. You talk about moving. You talk about different things.

Q. Those are casual conversations?

A. That's all it was at the particular time, casual conversation.

Q. But you recall those facts these years later, do you not?

A. Due to the fact—yes, I do remember, due to the fact that several months later—

Q. If I may—go ahead and finish. I am sorry. Finish. I didn't want to interrupt you. Are you finished?

I started to interrupt you.

A. You stopped me.

Q. I am sorry. Go ahead.

A. I will leave it up to you now. I don't know what we were talking about.

Mr. Hadden: Do you want to read the start of his answer?

A. You will have to read that back.

(The following answer was read by the reporter:)

"Due to the fact—yes, I do remember, due to the fact that several months later—"

A. Several months later the man reported off sick, and then this here conversation came back to me that I had with him.

Q. Was it after he reported off sick that the first conversation came back to you?

[fol. 804] A. After he reported off sick?

Q. Yes.

A. Yes, after he reported sick, then it came back to me, the conversation I had.

Q. Which, the first one?

A. Yes, sir.

Q. When did the second conversation come back to you?

A. At the same time I would say.

Q. At the same time the first one came back to you?

A. That's right.

Q. Now, did he brush his leg like this at the first conversation?

A. No, he brushed his leg like this at the second conversation.

Q. How did he brush his leg at the first conversation?

Mr. Leasure: I will object to that.

Q. If there was a brushing of the leg.

Mr. Leasure: Yes. It assumes something that is not in evidence.

A. I will answer that. There was no brushing of the leg on the first conversation.

Q. Now, then, stand up, please, again, and show the jury exactly the motion he made when he made it.

(Witness demonstrates.)

Q. That is the way he did it?

[fol. 805] A. That's true.

Q. When did he tell you the bug rolled down his pant leg?

A. At the time he had the second conversation, and he had demonstrated to me the way he killed the bug.

Q. What did he tell you the first time about what happened to the bug, whether it rolled down his leg or not?

A. He didn't say anything about it the first time, the first conversation I had with him, that he slapped the bug.

Q. And those conversations were how far apart?

A. Oh, I don't know. I would say approximately a week or 10 days.

Q. A week or 10 days apart, you don't know whether the first one happened in the daytime, morning, or nighttime, but you worked from 6:00 to 2:00 that month, is that right?

A. That's right, I worked from 6:30 to 2:30.

Q. When did the second conversation take place with relation to whether it was morning or night?

A. Well, I wouldn't know the hour of the day, sir.

Q. Well, again I ask you—

A. I wouldn't remember the hour of the day.

Q. Can you remember whether it was in the morning or at night?

A. Either in the morning or afternoon. I wouldn't say too much about night, because my hours were 6:30 to 2:30.

Q. Well, will you swear that it wasn't at night?

[fol. 806] A. I am almost positive it wasn't at night, because I say my hours were 6:30 to 2:30.

Q. Now, that is the second conversation, is that right?

A. That's true, yes.

Q. At that time there was no question in your mind that this had happened at work, was there?

Mr. Leasure: I think I will object to that, your Honor. All he can relate is the conversation.

Mr. Dudnik: Well, I will withdraw that if it is objectionable.

Q. At that time there was no question in your mind but what he told you it happened at work, the second time?
A. The second time he told me it happened at work, yes.
Q. And at that time did he tell you this bug rolled down his pant leg?
A. That's what he said, yes.
Q. And you knew it happened at work?

Mr. Leasure: I will object to that.

Q. From what he said. I will withdraw that. You knew that he said it happened at work, right?
A. He said, the second conversation he told me that now he remembers he slammed the bug on the side of his pant leg and it fell down on the ground.
Q. At work?
[fol. 807] A. At work.
Q. Right?
A. That's right.
Q. You were his superior, were you not?
A. That's true.
Q. Being the yardmaster?
A. Yes.
Q. You were his superior, were you not?
A. Yes, sir.
Q. Did you ask him to make a report of this incident when he told you about it the second time?

Mr. Leasure: I will object to that, your Honor, on the ground it is irrelevant.

The Court: We have been talking about reports here. He may answer.

A. Will you word it again, sir?

Mr. Dudnik: Read the question.

(Last question was read by the reporter.)

A. Did I—
Q. Do you want the question read again?

A. Yes, I want it read again. It didn't sink in. Read it again.

(Same question was read by the reporter.)

A. We have a poster at our various offices stating that when a man becomes injured he will when physically able [fol. 808] to do so report the condition to his superior officer, and make a report.

These reports or set forms are on hand for this purpose throughout the railroad yard office, when they are required by any person or persons, and in this case this man did not ask me to make a report or to assist him in making a personal injury report covering the conversation in regard to a bug bite.

Mr. Dudnik: Your Honor, I ask that the answer be stricken as not responsive. If I may ask, your Honor, before ruling—

The Court: I remember the question.

Mr. Leasure: It certainly is responsive, your Honor. It is the exact subject inquired about.

The Court: I think the question was did you ask this plaintiff to make a report?

Mr. Dudnik: That's right.

Mr. Leasure: I think, if your Honor please, the answer indicates that there is no duty on the supervisor to request the employee to make a report.

Mr. Dudnik: Do you think, your Honor, it is necessary for Mr. Leasure to make a jury speech?

[fol. 809] Mr. Leasure: Well, he is explaining. It is posted in writing.

The Court: Just a minute. I will rule on this. The question was asked of this witness, did you ask the plaintiff to make a report?

It is the Court's ruling that the answer was not responsive. The answer will go out, and the reporter may read the question once more, and then respond to the question as it is asked, sir.

Mr. Leasure: Note an exception.

(The following question was read by the reporter:)

"Did you ask him to make a report of this incident when he told you about it the second time?"

Mr. Dudnik: Answer that yes or no.

Mr. Leasure: I object. He should be allowed to explain his answer.

The Court: He may answer yes or no. If you can't answer yes or no, then qualify your yes or no.

A. No, I didn't tell him to make a report of it, and—

Q. Have you finished your answer?

A. Sir?

Q. Have you finished the answer?

A. Yes. That's all I could say about that.

[fol. 810] Q. What if anything did you do about him telling you of the incident happening at work, that is, what did you do about it?

A. I didn't do anything about it. The man continued working and I didn't think there was anything wrong with him. That's one reason I didn't ask him to make a report.

Q. Oh, is that why you didn't ask him to make a report?

A. I didn't think there was anything wrong with him.

Q. Fine. What type of injury do you have to report on your railroad?

A. You report all injuries on the railroad, no matter how slight they are.

Q. Fine. Well, wasn't this—didn't you learn then that he had a slight injury when he told you about this condition?

Mr. Leasure: I think I will object, your Honor.

Mr. Dudnik: Just a moment. If your Honor please, I think—

Mr. Leasure: The question I think involves—

Mr. Dudnik: I don't think we need a reason, unless your Honor requires a reason. I don't think a reason for an objection should be given.

Mr. Leasure: Objection.

[fol. 811] The Court: Objection overruled.

Mr. Leasure: Guessing—

Mr. Dudnik: The Court isn't guessing. You may be talking, but the Court isn't guessing. I resent that implication.

Mr. Leasure: You can resent all you want to. In Federal Court we have to give reasons.

Mr. Dudnik: You are not in Federal Court, sir, and this Court knows the law.

Mr. Leasure: And in state courts we are entitled to give reasons if we desire, as you well know.

The Court: If there are any questions you want to take up with the Court, you will take them up with the Court and there will be no argument between counsel.

Mr. Dudnik: I am sorry, your Honor.

Q. Read the question.

A. What is the question, sir?

(Following question was read by the reporter:)

"Didn't you learn then that he had a slight injury when he told you about this condition?"

A. No, I didn't think it was an injury to report, due to the fact that he did not make an issue of it or press it that he wanted to make a report.

[fol. 812] Q. But do we agree that all reports of injuries must be made no matter how slight?

A. That's true.

Q. And did you know that at the time?

A. Yes, absolutely.

Q. What is the rule where one of your subordinates—he was a subordinate of yours, wasn't he?

A. That's true.

Q. What is the rule where one of your subordinates doesn't make a report, what do you do about it if you think one ought to be made?

A. I suppose you would criticize him.

Q. Sure you would. Did you criticize him? My question is did you criticize Mr. Gallick for not making a report?

A. No, I did not.

Q. And you didn't make one yourself either, did you?

A. No.

Q. And yet he told you about this thing twice, did he not?

A. That's true.

Q. Well, when did you next do anything about this bug bite that you heard Mr. Gallick speak of?

A. When did I do—what did I do next?

Q. Yes, what if anything did you do next about this bug bite?

A. What time are you talking about, from—

[fol. 813] Q. Next after the second conversation, give it to me in sequence, what did you do next?

Mr. Leasure: I will object.

Q. With relation to the bug bite.

Mr. Leasure: Just a moment. I will object, if I may state a reason.

The Court: You may state your reason.

Mr. Leasure: I trust it will be helpful to the Court. The question assumes that something was done next. That hasn't been established.

Mr. Dudnik: I said what if anything, your Honor.

Mr. Leasure: Oh, I didn't hear that. Read the question back.

(The following question was read by the reporter:)

"Next after the second conversation, give it to me in sequence, what did you do next?"

Mr. Dudnik: Read the one before that.

(The following question was read by the reporter:)

"What if anything did you do next about this bug bite?"

[fol. 814] Mr. Leasure: Which one do you want him to answer?

Mr. Dudnik: I will rephrase it. They are all the same question, Mr. Leasure, but apparently I will start from the beginning.

Q. What if anything did you do after the second conversation about the information you had with relation to Mr. Gallick's bug bite? Do you understand that question?

A. I didn't do anything.

Q. Did you talk to anybody about it after that?

A. No, sir, I did not.

Q. Did you talk to anybody recently about it?

A. I did recently, yes.

Q. When?

A. Oh, possible two weeks ago.

Q. Two weeks ago?
A. Yes.
Q. And how about before two weeks ago?
A. No.
Q. You are sure of that?
A. Yes.
Q. So that from about the middle of August of 1954 until about the first of June of 1959 you talked to nobody about the conversation that you had with Mr. Gallick?
[fol. 815] A. That's right.
Q. Do you know that an accident report had been made out about Mr. Gallick's bug bite within two or three months after it happened?
A. Yes, I knew that later on an accident report was made out on it, yes.
Q. When did you learn about it?
A. Oh, sometime in October when the report was made out.
Q. Fine. May I have the exhibit?
In October of 1954 you learned that an accident report had been made out, did you not?
A. Yes.
Q. Who did you learn it from?
A. My superior officer.
Q. Who is your superior officer? Which particular superior officer?
A. Mr. Gordon at the time.
Q. What was his job?
A. His job was terminal trainmaster.
Q. You learned it from him?
A. Yes, sir.
Q. Now, will you tell me, please, the conversation you had with Mr. Gordon about this report?
A. All that he told me, that a 790 was submitted covering a bug bite which Mr. Gallick had received, and it was on his [fol. 816] desk, and he had to go through the formality of mailing it to the superintendent.
Q. What did you tell him?
A. I didn't tell him anything.
Q. Didn't you at that time within two to three months after you had this conversation with Mr. Gallick, and you

heard a 790 report had been made out, and you heard that from your superior officer, didn't you tell him what you are telling this jury today?

A. No.

Q. You did not?

A. No, sir.

Mr. Dudnik: Thank you.

Redirect examination of Elmer Giese.

By Mr. Hadden:

Q. I have one or two questions. You used the phrase doubling over; what does that mean, sir?

A. That means working two tricks, from 6:30 to 2:30, and 2:30 to 10:30, when they are short of supervision.

Q. That would be 16 consecutive hours, approximately?

A. That would be 16 consecutive hours, yes.

Q. And did you on any occasion during the month of August of 1954 double over in that manner, if you can remember?

A. Yes, sir, I did. During summer months when they are short of men on vacation, going on vacation, then you [fol. 817] usually have a chance of doubling.

Q. Mr. Giese, when you talked about the second conversation, you mentioned that Mr. Gallick I believe it was said that he had been bitten near the Columbus Road freight house, is that right?

A. That's right.

Q. How far is that, sir, from the Columbus Road bridge?

A. Well, I would say number one house to the bridge, the Columbus Road bridge, is approximately around eight or nine hundred feet possibly.

Q. During the course of either of your conversations with him did you learn of anything from Mr. Gallick that led you to believe that this insect bite was an injury?

Mr. Dudnik: Objection.

Mr. Hadden: The point has been raised by you, Mr. Dudnik.

Mr. Dudnik: The only thing is—

The Court: Will you read that question?

(Last question was read by the reporter.)

The Court: Objection sustained.

Q. Mr. Giese, in the course of your experience, 40 years with the B & O, sir, have you ever heard of anyone reporting an insect bite on a form 790?

Mr. Dudnik: Objection.

[fol. 818] The Court: He may answer that.

A. That's the first time in my experience.

Q. One last question. Do you have anything to do in the course of your duties as a yardmaster with the handling of claims by employees for personal injury?

Mr. Dudnik: May I have that question read?

(The last question was read by the reporter.)

A. No, I don't have anything to do with that.

Mr. Hadden: That is all.

Recross examination of Elmer Giese.

By Mr. Dudnik:

Q. As a matter of fact, I understood you to say that if a man doesn't make a report out, you criticize him?

Mr. Leasure: Just a moment.

A. No, you didn't say report, you didn't say report, you didn't say an injury report.

Mr. Leasure: Just a moment.

A. You was talking about report forms.

Mr. Leasure: Just a moment. That was not established at all, Mr. Dudnik assumes—

A. It was not an injury report question.

Q. Did you say you didn't criticize him, if they don't make reports?

A. That question you raised before, you was talking [fol. 819] about reports. You did not say injury reports. We make various reports on the railroad, hundreds of them.

Q. Then I was mistaken, sir. All right.

If a man doesn't make out an injury report when he should make one out, do you criticize him?

A. Well, only in this respect; that he was injured, he reported off injured, we have to have an injury report to cover this, let's get this thing made out now.

Q. And that is your responsibility, isn't it?

A. That is part of my responsibility, yes, sir, as a yard man.

Q. So you do have something to do with injury reports, do you not?

A. Only in making them out. Not to process them.

Q. Now, after you had your conversation with Mr. Gordon—

Mr. Hadden: Who?

Mr. Nurenberg: Gordon.

Q. Gordon, is that the man's name, your superior?

A. Yes, at the time.

Q. That was late in 1954; between then and about the first of June of '59 you spoke to nobody about this, is that your answer?

A. That's true.

Q. And did any body speak to you about it in that interim?

A. No, not that I can recall.

[fol. 820] Q. Now, tell us who since the first of June of this year you spoke to about it?

A. Just the Baltimore and Ohio Railroad attorneys.

Q. Well, are you referring to these two gentlemen?

A. Yes, sir.

Q. Anyone else?

A. Not that I can recall.

Q. You just recall these two gentlemen?

A. Yes, these here two gentlemen here.

Q. How about Mr. Glenn, didn't you talk to him?

A. Oh, well, he was up there at the room, yes, when I was up there talking to the B & O attorneys, yes.

Q. Did you talk to Mr. Glenn about it?

A. Not personally, no. But he was there.

Q. How about Mr. Williams?

A. Oh, I only met Mr. Williams once. He is a B & O Claim Agent, I believe?

Q. That's right.

A. He was there one evening when I was required to report up there.

Q. How many separate times did you talk to people about this case?

A. Three or four—four times, I think.

Q. Four times?

A. Yes.

[fol. 821] Q. Four different days?

A. Yes.

Q. Were all the conversations had in the lawyer's office?

A. Yes, sir.

Q. Now, who told you about going to the lawyer's office?

A. My superior officer at the present time, Mr. Fleming.

Q. Now tell me what he told you, sir.

Mr. Leasure: I think I will object to this, your Honor. Certainly we are way beyond the bounds of relevancy here.

The Court: Objection sustained.

Mr. Dudnik: No further questions.

Mr. Hadden: You may step down.

We should like at this time, your Honor, to offer our exhibits in evidence.

(Defendant's Exhibits L and M were marked for identification by the reporter.)

Offers in Evidence

Mr. Hadden: Your Honor, we should like at this time to offer the reports of Dr. Heller, his office file, that is marked Defendant's Exhibits A, B, C, D, E and F.

All the other exhibits except Defendant's Exhibit J, K, L, and M have been received according to the reporter's notes. I should like to offer those at this time. Exhibits J, K, L and M remain to be offered, Defendant's Exhibit [fol. 822] J being the City of Cleveland sewer map; Defendant's Exhibit K being a smaller sewer map, and Defendant's Exhibit L and M being respectively two photographs showing the B & O property lines in the vicinity of the Columbus Road bridge, that is Exhibit L; Exhibit

M being a larger photograph showing the Columbus Road bridge and also the entire downtown area of Cleveland with the B & O property lines in colored ink on it.

The Court: I have Exhibits A through F, and J, K, L and M.

Mr. Hadden: That's right, the intervening ones have already been offered as part of the Plaintiff's case.

The Court: Without objection they will be received.

Mr. Dudnik: No objection.

Mr. Leasure: At this time, your Honor, may I simply hold up in front of the jury Defendant's Exhibit L and point out to them what it is, and when they are in their jury room they can look at it more closely.

This is an aerial photograph of the flats area, including Columbus Road bridge.

The red lines show the limits of the B & O property, [fol. 823] in that area. Where there are buildings appearing such as over here the lines intend to look through the building, so the fact that a line may appear to include a building does not mean that the building is on the B & O right-of-way. The line is looking through the building down to the ground. The only exception on this exhibit, which is not marked off by lines is Lime Road which goes from Columbus Road down to the plants here in this area including Mau-Sherwood, and so forth.

The person drawing this map did not draw in the red lines to show that Lime Road is not B & O property, as he should have done.

Otherwise, the drawing is complete, and by looking at it you can observe where the B & O property is in that area, and where it is not.

And I call your particular attention to Columbus Road bridge here at this point where I am pointing, you will notice that the property line narrows in there, so that it runs alongside what appears to be each edge of the bridge, and then broadens out on the one side and goes straight on the other side.

Defendant's Exhibit M is a large aerial photograph which is larger than the one presented by the plaintiff, [fol. 824] and it also has certain colored lines on it, which may not be visible to you from this distance.

But the legend of those lines appears in the upper left-hand corner.

Once again the red line shows the property line of the Baltimore and Ohio Railroad in this entire area.

So if any question comes up as to what property they own or did not own, it shows on this photograph.

The area in the lower right-hand section of the photograph where I have my finger, and enclosed in red lines, is the Clark Avenue yard which has been referred to here many times in the evidence. Keep this place in mind.

I will point to a very small circle here where my finger is, this is the Columbus Road bridge.

I think you can see in this photograph the Cuyahoga River which runs a meandering course in this manner here, and out to the lake.

The yellow lines which are all circular lines, show one-half mile concentric circles, starting from the Columbus Road bridge here, where I have my finger, so that this circle is a half mile.

[fol. 825] Of course, the second one is a mile, and the third one a mile and a half.

The green lines show property owned by the Baltimore and Ohio, but leased to others and not controlled by the Baltimore and Ohio.

The black line, I think it is black, let's see, I think it is supposed to be dark blue, at least this legend here is property owned by others but leased to the Baltimore and Ohio Railroad and controlled by the Baltimore and Ohio.

So if any question comes up about who owns what property, this aerial map as marked should be of help.

I think we will have this marked, too, in the interest of complete necessity. That is the blueprint of the tracks and the property area.

Mr. Dudnik: If you don't know the lines, how is the jury going to know?

Mr. Leasure: Except as related here. Well, we better have this marked.

(Defendant's Exhibit N was marked for identification by the reporter.)

Mr. Leasure: At this time the defendant offers Defendant's Exhibit N, your Honor, which is a so-called track [fol. 826] station map of the Baltimore and Ohio Railroad

Company, which shows the area here in question, including Columbus Road bridge, as well as other area adjacent thereto. It is in the form of a blueprint.

The Court: Without objection it may be received.

Mr. Leasure: Then one last thing, members of the jury, and again without passing this around, this is a blueprint which shows the area in the general vicinity of Columbus Road bridge, showing Columbus Road, Columbus Road being marked here at this location, and running up this way generally.

And I take this point here to be the bridge.

Once again the red lines show the property lines of the Baltimore and Ohio Railroad Company. This map here does show Lime Street, it is called here, and once again the man making this did not draw red lines down Lime Street, although it is a public road and not owned and controlled by the Baltimore and Ohio.

But at least it is marked there so you can see where it is as well as all the other streets.

This also includes a diagram of the various factories in the area with their names marked on, such as Mau [fol. 827] Sherwood, Sherwin-Williams, and other locations which have been referred to here in the evidence.

The defendant rests.

Thereupon the defendant rested.

[fol. 828] **Rebuttal**

Thereupon the plaintiff, further to maintain the issues on his part to be maintained, and to rebut the testimony adduced on behalf of the defendant, called as a witness Leon Plevin, who, being first duly sworn, was examined and testified as follows:

Direct examination of Leon Plevin.

By Mr. Dudnik:

Q. I want you to talk loudly and clearly so all these folks can hear you.

Give us your name in full.

A. Leon M. Plevin.
Q. Spell your last name?
A. P as in Paul, l-e-v-i-n.
Q. Where do you live?
A. 1215 Ranchland Drive, Mayfield Heights, Ohio.
Q. Are you a family man?
A. I am.
Q. How old are you?
A. Twenty-seven.
Q. What is your profession or occupation?
A. Lawyer.
Q. You are associated with me in my office?
[fol. 829] A. Yes, sir.
Q. Where did you go to law school?
A. Cleveland Marshall Law School.
Q. My alma mater. When did you graduate?
A. In June of 1957.
Q. Had you been with me before you graduated?
A. Yes, approximately two years before graduation.
Q. What did you do in my office for me before you graduated from law school?
A. Leg man. Checked dockets, medical reports, and examinations, and so forth.
Q. Did you also do investigating work?
A. Yes, I did, sir.
Q. Have you been practicing law since 1957 with me?
A. I have, sir.
Q. Leon, tell me, as part of your practice have you done investigating for me?
A. I have.
Q. What instructions have you had from me as to how to take a statement from a witness?

Mr. Leasure: We will object to this, your Honor.
The Court: Objection sustained.

Q. Did you at my request do some investigative work on the case of James Gallick versus the Baltimore and Ohio Railroad?
[fol. 830] A. I have.
Q. And did you at my request take statements from witnesses in connection with that case?

A. I have.

Q. Was one of those statements obtained from a man by the name of Benedict Brodzinski?

A. That's right, sir.

Q. Do you recall when you saw him?

A. A week ago Saturday, in the evening.

Q. When did you get his name with regard to seeing him?

A. Approximately Saturday afternoon.

Q. From whom did you get it?

A. From you, sir.

Q. What were your instructions when you went out to see him?

Mr. Leasure: I will object to that.

Mr. Dudnik: I will withdraw it.

Q. Then, to get right down to the question, tell us whether or not you took a signed statement from Mr. Brodzinski?

A. I did.

Q. Tell us whether or not you put in that signed statement all of the facts which he gave you?

Mr. Leasure: I object to the leading question.

The Court: Rephrase the question, please.

[fol. 831] Q. What did you do with relation to taking that statement, tell the jury in your own words?

A. Well, I went to his home and engaged in general conversation, told him who I was, and so forth, and told him I would like to speak to him about Jim Gallick's accident.

And we conversed for a period of time, and I said fine, I would like to write this down, and I took out a yellow pad that all lawyers use, and I took a 4-page statement which was what he had told me, and I put it down in as concise language as possible, and requested him to sign that statement, which he did so.

Q. Tell us whether or not in this conversation that you had with him before taking the statement, during taking the statement, or after taking the statement, whether or not he said to you anything about Gallick having told him he was cut by a sliver.

Mr. Leasure: Objection.

A. No, he did not, sir.

The Court: He may answer.

Q. He didn't?

A. He did not.

Q. If he had told you that would you have put it in the statement?

Mr. Leasure: Objection.

The Court: He may answer.

[fol. 832] A. I would have, sir.

Q. Did you give him a card before you went into conversation with him about the case?

A. Oh, yes. When I walked into his home I told him I am Mr. Plevin, I am checking into this accident, I wondered if he might speak to me. And he said who are you, and I said I am an attorney.

And he said who do you represent over here, and I said I represent Mr. Gallick.

And he said are you from Mr. Dudnik's office, and I said I was.

He said what is your name again, and I said Plevin.

And he had some difficulty pronouncing it and I took out a card from my wallet and I handed it to him, which has Mr. Dudnik's name on the card, and my name in the corner of it, of the card.

Q. Do you remember taking a statement from Mr. Corrigan?

A. I do, sir.

Q. Do you remember in that statement him telling you of a rumor he heard as to—

Mr. Leasure: Just a moment. I think I will object to this.

Mr. Dudnik: You wanted to know about Mr. Plevin, and who was this mysterious Mr. Plevin. Here he is and you can cross-examine him.

[fol. 833] Mr. Leasure: I don't see where this is relevant at all.

(Thereupon court and counsel conferred at the bench outside the hearing of the jury.)

Mr. Dudnik: You may now have Mr. Plevin.

Mr. Leasure: Thank you very much.

Mr. Dudnik: Just a moment, please, if I may.

By Mr. Dudnik:

Q. In taking that statement from Mr. Brodzinski, did you write the whole thing out before he read it or did you do it in another manner?

A. No, I engaged him in general conversation, finding out what he knew about the facts and situation involving Mr. Gallick. And then—in fact, he brought over a table, a little end table for me, and I put my tablet on the end table and wrote out a 4-page printed statement, at which time I said I wondered if you might go over this and read it.

We were in the living room at that time. And he took us into his kitchen, and we sat down at his kitchen table and I handed it to him and he read the 4-page statement.

In fact, let's see, 4 pages, I remember on the third page that there was some question as to the wording which he didn't prefer or care for, and there were instances which I [fol. 834] crossed out wording which he didn't care for, and I put in additional phrases or words concerning the statement which he signed each correction, and then he signed each page, and I think at the end he also signed the statement.

Mr. Dudnik: That is all.

Cross examination of Leon Plevin.

By Mr. Leasure:

Mr. Leasure: May I have the statement?

Mr. Dudnik: Yes.

Q. Mr. Plevin, you are on Mr. Dudnik's payroll, is that correct?

A. That's correct, sir.

Q. And you have been for how long now?

A. Four years this past June.

Q. In other words, you are employed by him?

A. That's correct, sir.

Q. He can terminate your services any time he desires?

A. I imagine so.

Q. You say you are a family man, married, with children?

A. Correct, family, two children.

Q. Now, what did you do previous to going to work for Mr. Dudnik?

A. I was working at the First National Credit Bureau.

Q. And then you went with Mr. Dudnik what, four years as an investigator?

[fol. 835] A. On June 14, 1955.

Q. Then you took law work and passed the Bar about two years ago?

A. Yes, I passed the Bar in August of '57.

Q. So you have been a practicing lawyer almost two years now?

A. Two years.

Q. Now, I suppose in the time that you worked for Mr. Dudnik you have taken many statements from witnesses, have you?

A. I have taken statements, sir.

Q. Will you tell us how many different ways there are to take statements from witnesses, in your experience, Mr. Plevin?

A. Well, I only consider there to be one way to take a statement.

Q. My question may not be clear. You can take a statement which you yourself write out, that is one form.

A. I understand what you mean, yes. Handwritten statement and also stenographic statement.

Q. In other words, if you want to get down everything that the person has to say in exactly their own words, you take along a court reporter, or someone of that kind who takes it down like this man is doing here, isn't that correct?

A. That would reflect the question-and-answer type of statement.

Q. That's right, and in that way you get the person's own words and his own phraseology, don't you?

[fol. 836] A. I imagine so.

Q. Well, you know, sir, don't you?

A. Yes, that would be correct.

Q. Because that is exactly what he says, isn't it?

A. Sure.

Q. And it includes everything he says, doesn't it?

A. That's correct.

Q. There is no doubt about it, then?

A. No doubt.

Q. You didn't do that in the case of Mr. Brodzinski's interview, though, did you?

A. No, I did not.

Q. You have done that, have you not, in other cases where you have investigated and talked to witnesses?

A. No. Most of the cases that I have investigated I usually take a handwritten statement. There are occasions when I have taken stenographic statements.

Q. You know Mr. Dudnik often has—whether you are taking it or somebody else from his office is taking it has a reporter there and taking everything down, you know that, don't you?

A. In what fashion, in what manner, sir?

Q. Well, if you go out to somebody's house, particularly during the course of a lawsuit, you know that he often has a court reporter to go along so that everything is taken [fol. 837] down, don't you?

A. No, I don't know that.

Q. You don't know that?

A. No.

Q. Do you deny it?

A. Deny that Mr. Dudnik takes a statement?

Q. Or others in your office take statements that way?

A. Not conclusively.

Q. You say you usually do it in this method here on a yellow pad in your own handwriting?

A. The majority of the time I take a handwritten statement.

Q. Now, when you went out to see Mr. Brodzinski, you knew this case was in the process of trial, did you?

A. I did, sir.

Q. You knew it was important, didn't you, that you get down everything he had to say about it?

A. I imagine, yes, I would say so.

Q. And you still didn't take a court reporter with you?

A. No, I did not.

Q. Are you in the habit of taking undated statements, Mr. Plevin?

A. I imagine almost all my statements—well, in fact, I only take a statement and put down the facts that they tell me. I don't think I ever dated a statement.

Q. Is that part of your technique, not to date a statement?

[fol. 838] A. Well, I don't see frankly, it doesn't have much to do with the case at all.

Q. Don't you think a witness some time later would like to know or you yourself would like to know the exact date that you took the statement?

A. I am only interested in the facts of the case and the truth of the matter, and I don't think the date is at all important, sir.

Q. One of the facts of the situation is the date that you go to see him, isn't it?

A. Not essentially, no, I don't believe so at all.

Q. Then you make a practice of not putting any date on your statements, is that what we are to understand?

A. That's correct, I do not date any statement. I may be right or wrong, I don't know, but I don't do it.

Q. Now, I take it, am I correct in assuming this, that when you go and talk to a witness, particularly during the course of a trial, that you are very careful that you put down everything that he says that may favor your side of the case?

A. No, no, sir, that is incorrect.

Q. Do you say you don't put everything down that he says that favors your side of the case?

A. That's correct, sir. I am only interested in the truth.

Q. Well, is there some distinction here between the truth and that which favors your side of the case? I don't follow [fol. 839] you.

Mr. Dudnik: Your Honor, just a moment. There is an objection and it is a very unfair question.

The Court: Objection sustained.

Q. Are we to understand then that you don't put in your statement the substance of everything the man tells you?

A. No, that is wrong. I do put in the substance of everything the man does tell me.

Q. So then you put in everything he tells you that favors your side of the case, is that correct?

A. Whether it is beneficial or detrimental makes no difference. We are interested in knowing what our position is going to be in the matter.

Q. Now, you knew, did you not, what use was going to be made of this statement that you took of Mr. Brodzinski? You knew what the purpose of your going out there was, didn't you?

A. Yes.

Q. You knew that this case was in the course of trial, didn't you?

A. Certainly.

Q. And you had some indication, did you not, that we might call Mr. Brodzinski here as a witness, didn't you?

A. Not as a probability. Perhaps as a possibility. I had [fol. 840] no actual knowledge that he was going to be called.

Q. And you wanted to get a statement from him that you might use in cross-examination, isn't that correct?

A. We wanted to know what he would have to say about this matter, as I have done in the past statements taken.

Q. All right. How long were you there, from the time you first got there until you finally left?

A. Well, I remember leaving the house, I would estimate offhand I got there approximately quarter to eight in the evening.

Q. How long were you there, that was my question.

A. How long was I there?

Q. Yes.

A. From approximately quarter to eight to about a quarter after nine, maybe twenty after nine, twenty-five

after nine. Approximately an hour and a half to an hour and forty-five minutes.

Q. How much of that time would you say was spent talking about what he knew about this case?

A. Oh, I would say I engaged him in conversation for approximately 20 minutes or so, somewhere in that vicinity. I can't be absolutely sure. Maybe a little longer. We talked about many things.

Q. How long were you there before you started talking about this case?

[fol. 841] A. Well, I think—when I first entered his home I told him who I was and what I was out to talk to him about, and he got into the subject of the case immediately.

Q. Can we agree with this, that as a result of an hour and a half's conversation we end up with a 4-page statement written by you?

A. Well, you mean as a result of being there for an hour and a half, but not an hour and a half conversation, no. I was there a total of maybe an hour and a half or longer.

Q. That is why I asked you how long you spent talking about this case. You talked about the weather and so forth?

A. Actually, regarding this case, I would say approximately in the vicinity of 20 minutes or so, conversing. It may have been longer. It could have been a half hour. I am not exactly sure.

Q. You mean that you spent an hour or hour and ten minutes talking about things entirely unrelated to this case?

A. No, it took me a considerable period of time to print out 4 pages.

Q. And did you keep talking to him off and on as you were printing it out, or did you just start and print it all the way through without further conversation?

A. Oh no, I would try to organize the statement as best as possible in orderly fashion. And as I recall, I may have spoken to him to give him the idea of what I was putting [fol. 842] down in the statement, whether or not those were his thoughts. Generally speaking that would be the way I did take down the statement.

Q. But whatever is said here was your choice of language, wasn't it?

A. No. Some of that is his choice of language. Some of it he had to explain to me which I didn't understand.

Q. Did he dictate any of this to you?

A. No. That was his thinking as reflected in my writing.

Q. In other words, what he said went through your brain, down your arm, and you wrote it out, is that it?

A. If you want to look at it from that point, yes.

Q. Mr. Plevin, when you talked to him weren't you interested in finding out for example whether he had ever been bitten by an insect on this job down there?

A. Would you please repeat the question?

Q. Weren't you interested in finding out from him whether he had ever been bitten by an insect while working on this Seneca Street job or downtown job?

A. No, I didn't think it important, because I was asking him about what he knew about Jim Gallick. That was the subject of my visit, to find out what he knew about Mr. Gallick.

Q. You asked him a lot of things, didn't you, about his experiences on the job down there, not Gallick's, I mean [fol. 843] Brodzinski's experience on the job?

A. As to what, sir.

Q. Well, as to about twelve things in the statement. Don't ask me what. The things you have got in the statement here. It isn't all about Jim Gallick itself; a lot of it is about Brodzinski's knowledge of the job?

A. Oh, yes, that's true.

Q. Certainly. Weren't you interested in finding out from Mr. Brodzinski whether he had ever had an experience like Mr. Gallick claims to have had while working on that job?

A. I perhaps just didn't even think of it at that time.

Q. You just didn't even think of it?

A. No, I didn't, sir.

Q. At least it didn't get in the statement, anyway?

A. Well, if it isn't—it isn't there, so it didn't get in the statement.

Q. Weren't you interested in finding out whether Mr. Brodzinski knew of anybody else who might have had a similar experience as this?

A. No, I didn't think of that phase of the case at all, sir. No, I didn't.

Q. Who else was present there at your conversation with Mr. Brodzinski?

A. Mr. Brodzinski and I were in the living room, and I believe his wife was seated in the kitchen.

[fol. 844] Q. I think you said that you and he went into the kitchen?

A. And she went into the living room. She didn't interfere in the business that we had between the two of us.

Q. She was in a position, was she not, to overhear what was said?

A. Maybe phrases. I doubt it sincerely. The television set was on, at a certain volume. I don't know if she could have heard what we were saying all the way in the kitchen or not.

Q. As a matter of fact, you asked her how to spell certain words, did you not?

A. Yes, I misspelled I think the word pigeons.

Q. You asked her how to spell it?

A. Yes, that's right. I said, "How would you spell it?"

Q. All right. So she was there close by at least, is that correct?

A. Yes, I called into the kitchen and asked her that.

Q. Are you telling us then that she was not in a position to overhear what Mr. Brodzinski told you about his conversation with Mr. Gallick?

A. As an opinion, I don't think she was.

Q. You don't think so?

A. I don't believe so, no.

Q. Where were you and Mr. Brodzinski when Mr. Brodzinski told you about his conversation with Mr. Gallick?

A. Where were we?

[fol. 845] Q. Yes.

A. Mr. Brodzinski and I were in the living room, sir.

Q. Was that early or late in your conversation with him?

A. That was I would say within a few minutes after I had arrived.

Q. Was reference made to it then later on with reference to the conversation?

A. With reference to what, sir?

Q. To the conversation Mr. Brodzinski had with Mr. Gallick?

A. Oh, maybe as I was writing, it may have. I am not too sure. I don't recall that now. I imagine it probably could have been. I don't know.

Q. During this entire conversation you had with Mr. Brodzinski before you started writing, did you make any notes as you went along so that you could remember later on just what was said?

A. I think I had a piece of scratch paper there that I may have written down a word like pigeons that he told me, or slipping, because I didn't understand the phraseology he said something about—

Q. Where—

Mr. Dudnik: Let him finish, please.

Mr. Leasure: No.

Mr. Dudnik: Let him finish, please.

Mr. Leasure: He is way beyond answering my question. [fol. 846] I asked him whether he made any notes. Very simple. Either he did or he didn't.

A. Yes, it was on a piece of scratch pad.

Q. Where are those notes?

A. I don't have that, sir.

Q. What did you do with it?

A. When I was through with the statement I threw it out.

Q. You threw it away, all right.

A. It wasn't actually notes. It was phrases.

Q. All right. So it helped you pick up later on what he had said?

A. Yes, because there was some of it I didn't understand what he was talking about.

Q. In your experience as an investigator, Mr. Plevin, after you have a conversation with a person, whether it is 20 minutes or half an hour or whatever it may be, about a particular case, you find the notes that you make during the conversation help you to write out a full and accurate statement, isn't that correct?

A. By referring to it, to have it organized properly, yes, I would say yes to that point.

Q. And you did make such notes in this instance?

A. It was not notes. It may have been two or three

words jotted down to inquire, as I was writing the statement.

Q. Whatever it was, you destroyed it and you do not have [fol. 847] it here today?

A. Oh, yes, I don't keep that.

Q. Now, isn't this a fact, Mr. Plevin, and I want you to think very carefully before you answer, isn't this a fact, that when Mr. Brodzinski told you about his conversation with Mr. Gallick, he told you that Mr. Gallick told him that he had this place on his leg and he didn't know whether he got it from a bug bite or from a splinter or sliver, whatever the word might have been, on a car, and thereupon you repeated that statement in substance and that was overheard by Mrs. Brodzinski?

A. No, I didn't, sir.

Q. You didn't what?

A. I didn't repeat anything like that, and I didn't hear anything like that.

Q. Do you deny that Mr. Brodzinski said anything like that, or are you telling us you just didn't hear it?

A. I would have to say he didn't say it.

Q. You are telling us that now as your carefully considered statement?

A. Yes, sir.

Q. Are you telling us that Mrs. Brodzinski was not in a position to overhear what her husband told you on that subject?

Mr. Dudnik: Your Honor, there is an objection only be- [fol. 848] cause it has been asked before and he has given an opinion.

The Court: He has answered it before. He may answer it again.

A. No, I don't believe she could have.

Q. Do you know for sure, or is that just your opinion?

A. I would have to give you an opinion. I wasn't in her position to hear what the conversation was.

Mr. Leasure: That is all.

Redirect examination of Leon Plevin.

By Mr. Dudnik:

Q. Leon, why did you take a yellow page statement this time instead of a stenographic statement, tell us?

A. Well, I think, well, originally when I took, did some—you gave me some names to see, and I went out at my leisure and I took the statements.

Then, of course, there was a period when I took some stenographic statements in the case, and I think this was—well, you told me Saturday, and the only time my wife and I shop is Saturday afternoon, if I get home early enough, so I wanted to get home.

So I asked if it would be all right if I go out sometime during the weekend to see him, and Mr. Dudnik said yes. So I went out on my own time in the evening.

Q. Have you ever testified or been called to testify about any other statements that you have investigated for me? [fol. 849] A. No. This is the first time I have ever been on the witness stand.

Mr. Dudnik: That is all.

Mr. Leasure: Just a moment, Mr. Plevin.

Recross examination of Leon Plevin.

By Mr. Leasure:

Q. It is possible, is it not, to get a court reporter on Saturday afternon or Saturday evening, or at any other time if you really want one?

A. Well, you have to always say the answer to that would be yes, sure. I guess if you make enough effort to do anything you can.

Q. And you know, don't you, from your years of investigating, that it is quicker to take a stenographic statement than one of these handwritten statements, you are there a shorter time, aren't you?

A. If you are in a hurry, I would say it is all right to use a stenographic, sure. That is why I use it primarily for, is when I have to save time.

Q. In other words, if you had used a reporter to interview Mr. Brodzinski, you would have been there a shorter time than it took you by this method, is that right?

A. Yes. The answer is yes.

Q. And you would have had everything down just as it [fol. 850] was said?

A. That would be correct.

Mr. Leasure: That is all.

Further redirect examination of Leon Plevin.

By Mr. Dudnik:

Q. How long would it take you to get a court reporter on a Saturday night, do you know?

Mr. Leasure: I object to that. They are not hard to get.

The Court: Objection sustained.

Mr Dudnik: If you got a lot of money you do. Thanks, Leon.

[fol. 851] Thereupon the plaintiff, further to maintain the issues on his part to be maintained, and to rebut the testimony adduced on behalf of the defendant, called as a witness James R. Skelly, who being first duly sworn, was examined and testified as follows:

Direct examination of James R. Skelly.

By Mr. Dudnik:

Q. Mr. Skelly, will you give us your name in full, please?

A. James Richard Skelly.

Q. How old are you, Mr. Skelly?

A. 32 years old.

Q. Are you a married man?

A. No, sir, I am not.

Q. Single?

A. Yes.

Q. Where do you live?

A. I live at 2044 Cornell Road.

Q. Would you be kind enough to keep your voice up, Mr. Skelly? What is your present business or occupation?

A. I am the registrar at the Cleveland Museum of Natural History.

Q. What are the duties of a registrar at the Museum of Natural History?

[fol. 852] A. I see to the registration of the specimens and records that are kept on them, and I have charge of the inactive museum departments, scientific departments.

Q. Are you in charge of the various specimens of insects that are kept at the museum?

A. Yes, sir.

Q. And are you in charge of recording them and cataloging them, and keeping the data on them?

A. Yes, sir.

Q. What schooling did you have, Mr. Skelly?

A. I have a Bachelor of Arts degree from Western Reserve University in the field of biology.

Q. Including biology?

A. Yes.

Q. When did you graduate from Western Reserve?

A. In 1955.

Q. Have you had any other schooling after that?

A. No, I have not.

Q. In connection with your University studies, did you take up the study of entomology?

A. Yes, sir, I did.

Q. You do not consider yourself an entomologist, do you?

A. By no means.

Q. Mr. Skelly, following your graduation from the uni-

[fol. 853] versity, what did you do, sir?

A. At the time of my graduation I was employed as curator of the Cleveland Aquarium.

Q. What is a curator?

A. Sort of a glorified caretaker, I suppose. I had charge of the operation of the Cleveland Aquarium. I was not the Director, but I had the active charge.

Q. Did that include the keeping of the records of the various fish?

A. Yes.

Q. And the cataloging of them?

A. Yes, and the maintenance.

Q. How long were you the curator there?

A. For approximately two years. Until 1957, I believe. I am not sure of the dates.

Q. What did you do following that, sir?

A. I was employed as a staff biologist by the Cleveland Museum of Natural History.

Q. A staff biologist?

A. Yes, sir.

Q. And how long were you the staff biologist?

A. Until April of this year.

Q. By the way, what does the term biology embrace?

A. The life sciences, generally. Biology has—it has roots in the Greek words, bios which means life, and ology which [fol. 854] is the root that means the study of.

Q. Study of life. Does that include animal and insect life?

A. Yes, sir.

Q. What were you then did you say?

A. Staff biologist.

Q. Following that you became what?

A. I became registrar.

Q. How long have you been registrar?

A. Since April of this year.

Mr. Dudnik: Mark this.

(Plaintiff's Exhibit 20, being a box of insects, was marked for identification by the reporter.)

Q. Did you pursuant to my request and pursuant to a subpoena bring with you some specimens of aquatic bugs or insects which were under your care and jurisdiction at the museum?

A. Yes, sir.

Q. Did you at my request go down to the Columbus Road bridge and look at an area under the bridge so that I might ask you some questions for comparative purposes?

A. Yes, sir.

(Mr. Dudnik hands Plaintiff's Exhibit 26 to Judge.)

Mr. Dudnik: These are dead, your Honor.

The Court: What number is this?

Mr. Dudnik: Plaintiff's Exhibit 26.

[fol. 855] Q. I am handing you what has been marked for identification as Plaintiff's Exhibit 26, and ask you to stand up here in front of this jury, and put the exhibit in the position where they can see it and I am going to ask you some questions about them.

Mr. Leasure: Has it been established that these particular specimens have come from the area—

Mr. Dudnik: They will be. I will ask that in my next question, in my next few questions.

Q. There are nine insects there, are there not?

A. Yes, sir.

Q. Do you know what area these insects were picked up from?

A. Generally northern Ohio. Northeastern Ohio, most of them. Some of them—

Q. A little louder, please.

A. Generally northeastern Ohio. Some of them are from other areas of Ohio, but they are all from Ohio.

Q. Now, let's take the specimen on the upper left-hand corner, will you point to it?

A. This one here?

Q. Yes. What is that known as?

A. That is known as a giant water bug.

Q. Is it also known as an aquatic bug?

A. Yes, sir. It is an aquatic bug.

[fol. 856] Q. Can you tell us where that specimen was picked up?

A. In Euclid, Ohio.

Q. Euclid, Ohio?

A. Yes, sir.

Q. What is the next specimen?

A. That is also a giant water bug.

Q. Can you tell us where that was obtained?

A. I can't quite read under the name. I think it is Sandwich, Sandwich Creek, or Sandwich River.

Q. Is that in this area?

A. I believe so, yes, sir.

Q. No, sir, the big one there, number three—

A. Yes, sir.

Q. What is that?

A. That is also a giant water bug.

Q. Where was that specimen picked up?

A. In Youngstown, Ohio. Near Youngstown. I shouldn't say in Youngstown.

Q. Now, let's go to that one with the long wings—

A. Yes, sir.

Q. I am pointing to this specimen here, sir.

A. Yes.

Q. Where was that, what is that known as?

A. That is known as a Dobson fly.

Q. Where was that picked up?

[fol. 857] A. That is in Ohio. We don't know the exact locality of that, but we do know it is from Ohio.

Q. Will you give us now the locations of the three below?

A. The three below are from Euclid, Ohio, water scavenger beetles. These two are water scavenger beetles. These two are from Euclid, Ohio, and this one I can't see the locality of that. It is from the Ohio creeks, though. There is probably a little slip under there.

Q. Now, Mr. Skelly, referring to this specimen on top, did you measure it at my request?

A. Yes, sir.

Q. What is the length of that bug?

A. It is approximately two and a half inches.

Q. By the way, have you ever been a collector of these things?

A. Yes, sir. I have from time to time collected insects.

Q. Have you ever seen a water bug in the Cleveland area of that size?

A. Many times.

Q. Have you ever seen a water bug in the Cleveland area of a larger size?

A. Yes, sir, occasionally.

Q. Do you recall the area under the bridge—

A. Yes, sir.

Q. Yesterday?

[fol. 858] A. Yes, sir.

Q. Now, with relation to a similar area, similar in appearance, have you ever seen a bug of the species and size

of this large one in an area similar to the area which you saw yesterday under the bridge?

Mr. Leasure: I object.

A. Yes, sir, I have.

Mr. Dudnik: Just a moment.
Mr. Leasure: I object.
The Court: What is the objection?
Mr. Leasure: Two-fold, your Honor. First he says similar to that. That could cover a pretty wide area. It is indefinite at best. And, secondly, whether he ever saw, going into possible—
Mr. Dudnik: Not possible. He knows whether he saw it or not.
The Court: He may answer.
Mr. Dudnik: Read the question, and then answer it.

(Last question read by the reporter.)

A. Species I couldn't refer to. But I certainly have seen giant water bugs in areas similar to that.
Q. I am talking about water bugs. You have seen them there?
A. Yes, sir.
Q. Have you seen them—bearing in mind, I am talking [fol. 859] now with reference to a similar area. Have you seen them in the water?
A. Yes, sir.

Mr. Leasure: Objection. May I have an objection continuing to this entire line?
The Court: Yes. He may answer.
Mr. Leasure: Also on the grounds of relevancy.

Q. Have you seen them on the ground around the water?
A. Yes, sir, I have.
Q. These folks can't hear you.
A. Yes, sir, I have.
Q. Now, then, have you ever seen them crawl?
A. Yes, sir, I have.
Q. Can you tell us whether they crawl fast or slow?

Mr. Leasure: I object, your Honor.

A. I would think—

The Court: The objection will be sustained.

Q. You have seen them crawl?

A. Yes, sir.

Q. And have you seen them crawl many times or few times?

Mr. Leasure: Objection.

The Court: Objection sustained.

[fol. 860] (Thereupon counsel and the Court conferred at the bench outside the hearing of the jury.)

Mr. Dudnik: Now, what is the question?

(Last question was read by the reporter.)

Q. Just answer whether you saw them crawl many times or a few times?

Mr. Leasure: I think there was an objection.

The Court: That was the whole line of questioning that you objected to.

Mr. Leasure: And I object specifically to this question.

The Court: Have you seen them crawl many times or a few times?

Mr. Leasure: Objection.

The Court: He may answer.

A. A few times.

Mr. Hadden: What was the answer?

Mr. Dudnik: A few times.

A. That is not with reference to the number of insects which I have seen crawling, but the number of times I have seen them crawling.

Q. I am talking about water bugs.

A. Yes, sir.

[fol. 861] Q. Have you seen them crawl many times or a few times?

A. I have seen water bugs crawl a few times.

Mr. Dudnik: Now, my next question I know will be objected to, your Honor. May I ask it for the record?

The Court: You may.

Q. Have you an opinion based on the times that you have seen these water bugs crawl as to how long it would take a water bug to crawl up a man's leg from the heel to four inches above the knee, but you answer that yes or no, and don't give your opinion. Have you such an opinion?

Mr. Leasure: I think I will object right here, your Honor, because the man has not been qualified as an expert in the field; whether he has an opinion or not doesn't make any difference.

The Court: Objection will be sustained.

Q. Do you know whether or not the water bugs, the type of water bugs which you just showed us, bite man or not?

Mr. Leasure: Objection.
The Court: Sustained.
Mr. Dudnik: If he knows.

Q. Have you ever been bitten by a water bug?

Mr. Leasure: I object.

A. Yes, sir.

[fol. 862] The Court: He may answer.

A. Yes, sir, I have.
Q. You may resume the stand.

(Witness resumes witness stand.)

Mr. Dudnik: No more questions.
Mr. Hadden: Are you going to offer that?
Mr. Dudnik: I am not going to offer that, no.

Cross examination of James R. Skelly.

By Mr. Hadden:

Q. Mr. Skelly, in answer to Mr. Dudnik's questions—withdraw the question.
What did Mr. Dudnik ask you to do when he first got in touch with you about this matter?

A. He asked me if I knew of any insect over an inch and a half or two inches long which are capable of biting man that occur in this area.

Q. And your collection of insects which you brought with you is in response to that request?

A. Yes, sir. He asked me then to bring them down with me to his office.

Q. He asked you whether or not any of these insects which you were aware was capable of biting a man, is that right?

[fol. 863] A. Yes, sir.

Q. Tell me a little bit about your training, Mr. Skelly, in entomology, what does it consist of?

A. I had a course, one course in entomology at Western Reserve University.

Q. How long ago was that?

A. Well, 1954.

Q. How long a course was it?

A. Well, one semester course, a three-hour course.

Q. An elementary course?

A. Yes, sir. Introductory I would say, not an elementary course, but an introductory course.

Q. Introductory course, this was the first course you ever had to the subject matter, is that so?

A. Yes.

Q. Then you very properly say you cannot describe yourself as an expert in this field?

A. I would not by any means call myself an expert in the field of entomology.

Q. In answer to Mr. Dudnik's question you said you had seen giant water bugs in areas similar to the one which he asked you to visit, sir, do you recall that answer?

A. Yes, sir.

Q. Did you see any down there at the time you visited?

A. No, sir, I did not.

[fol. 864] Q. Did you look for any?

A. I believe it; is too early now. I just went to look at the area mainly.

Q. Can you describe an area which you have seen that looks like the one under the bridge?

A. The opening of Euclid Creek into the lake, about three hundred yards back from the shore of the lake.

Q. That is fresh running water?

A. Well, it is water, and it is running, but I wouldn't exactly describe it as fresh.

Q. It is running water?

A. Yes.

Q. What do you know about the habits of the giant water bugs, sir?

A. I know that they are found in fresh water, practically. They are generally distributed throughout the world. Beyond that I don't know.

Q. What does the word aquatic bug mean?

A. Aquatic bug means that it lives in the water; the same as a duck is an aquatic bird.

Q. What does the giant water bug feed on?

A. The giant water bug feeds on other insect and plant and animal material. Mainly animal material, small fish, crayfish, and things like that.

Q. Things that it finds in the water?

[fol. 867] A. Generally, yes, as far as I know. I couldn't testify as to the dietary habits of the bug.

Q. Are they the sort of insect, sir, that habitually preys or attacks human beings?

A. Only when they are improperly handled. At the time I was bitten was when I improperly handled one. It started to run up my arm and I grabbed it and he bit me.

Mr. Hadden: That is all.

Mr. Dudnik: Thank you. Your Honor, may I show these to the jury once more?

Mr. Hadden: Your Honor, there is an objection in that the only bug that has been testified to by this gentleman is the giant water bug. And this is full of specimens that have in no way been connected with this case.

Mr. Dudnik: I just want to show them, let them see this. They have seen it before. I just want to show it once more.

The Court: Are you introducing it in evidence?

Mr. Dudnik: It has been introduced—I am not offering it. I am sending it back to the curator of the museum.

They have seen it before, and I want them to see it once more.

Thank you, Mr. Skelly.

[fol. 866] Thereupon, JAMES J. GALLICK, plaintiff herein, further to maintain the issues on his part to be maintained, and to rebut the testimony adduced on behalf of the defendant, offered himself as a witness in his own behalf, and being previously sworn, was examined and testified as follows:

Direct examination of James J. Gallick.

By Mr. Dudnik:

Q. Jim, I have to ask you a couple of questions. Jim, do you know Benedict Brodzinski?

A. Brodzinski, yes.

Q. Jim, I want you to tell the judge and the jury whether you ever talked to Ben Brodzinski, or Benedict Brodzinski, about the way you had your accident?

A. I did not.

Q. You did not?

A. I did not.

Q. Did you ever tell him you were bitten by a bug?

Mr. Leasure: I think I will object to this, your Honor. He answered he didn't have any such conversation. Anything else is repetitious.

Q. Do you know Mr. Giese, the yardmaster?

[fol. 867] A. I do.

Q. Did you ever talk to Mr. Giese about your accident?

A. I did not.

Q. Did you ever tell him anything about it?

A. No.

Q. Did you ever wear shorts?

A. Never.

Q. Did you ever work outside in your yard in shorts?

A. No.

Q. Have you ever seen Brodzinski of Giese since you

didn't return to work, in other words, did they ever see you at the hospital or at home?

A. No.

Mr. Dudnik: That is all.

Mr. Leasure: No questions.

The Court: Ladies and gentlemen of the jury, we will recess for the luncheon period now, once more with the admonition that you do not talk about this case to anyone, not even amongst yourselves, and you will return at 1:30.

(Thereupon an adjournment was taken to 1:30 p.m., June 22, 1959, at which time the following proceedings were had:)

[fol. 868] Monday afternoon session, 1:30 p.m.,
June 22, 1959

Surrebuttal

Thereupon the defendant, further to maintain the issues on its part to be maintained, and to rebut the testimony adduced on behalf of the plaintiff on rebuttal, called as a witness Gladys Brodzinski, who, having been first duly sworn, was examined and testified as follows:

Direct examination of Gladys Brodzinski.

By Mr. Leasure:

Q. Will you give us your full name, please?

A. Gladys Brodzinski.

Q. Will you speak up? I can't hear you.

A. Gladys Brodzinski.

Q. Are you the wife of Mr. Brodzinski who has testified in this case?

A. I am.

Q. Where do you live, Mrs. Brodzinski?

A. 2498 West 8th Street.

Q. How long have you and Mr. Brodzinski been married?

A. 23 years.

Q. Calling your attention to an occasion a week ago last

Saturday, did a Mr. Plevin from Mr. Dudnik's office come [fol. 869] to your home?

A. Yes, he did.

Q. Were you present there when he arrived?

A. Yes, I was.

Q. Were you present there during all the time that he was there?

A. Yes, I was.

Q. Were you present when he and your husband had a conversation about the case of Mr. Gallick?

A. Yes.

Q. Will you tell us where you were or how close you were to the conversation between Mr. Plevin and your husband that was taking place?

A. Oh, about 10 feet.

Q. About 10 feet?

A. Yes.

Q. Can you tell us, Mrs. Brodzinski, whether you overheard all of the conversation that took place between those two men?

A. Yes, I did.

Q. Did there come a place in their conversation when your husband told Mr. Plevin about a conversation your husband had had with Mr. Gallick?

A. Yes.

Q. Will you tell us in your own words what it was that [fol. 870] you overheard your husband tell Mr. Plevin on that subject?

A. He said that Mr. Gallick told him that the day before he had been either bitten by a bug or a piece of steel sliver. It was in his leg, of course.

Q. Was that the extent of it on that subject then?

A. Then my husband told, he even picked up his pant leg and showed it to my husband and my husband said it looked pretty bad, and told him to either go to a druggist or a doctor, or make out a 790.

Q. Is that what you overheard your husband telling Mr. Plevin?

A. Yes, I did.

Q. And upon your husband saying what you have described did Mr. Plevin say anything?

A. Mr. Plevin repeated the same thing as my husband said and proceeded to write it down.

Q. Will you tell us in your own words the substance of what Mr. Plevin said when your husband told him what you have just related?

A. Mr. Plevin just wrote it down. He didn't make any comment on it. He says "Do you know if Jim ever made out the 790?" And he said he didn't think he did.

Q. Perhaps I didn't understand you. Let me get it clarified. Did you say when your husband told Mr. Plevin that, that Mr. Plevin repeated it?

[fol. 871] A. Yes, he did, he repeated it and wrote it down.

Q. Will you tell us just what it was that Mr. Plevin said?

A. He said it was a bug bite or a piece of steel sliver.

Q. That is Mr. Plevin said that?

A. Yes.

Q. Now, have you ever testified in court before?

A. No.

Q. Try not to be nervous, if that is possible. If you know, did I talk to your husband Saturday and ask that you come down here today?

A. Not that I know of. I think he—somebody told me, he told me I was supposed to be down but I don't know who told him.

Q. All right. So your husband asked you to come down here today?

A. Yes.

Q. But you don't know who asked your husband to ask you?

A. No.

Mr. Leasure: That is all. You may cross-examine.

Cross examination of Gladys Brodzinski.

By Mr. Dudnik:

Q. Mrs. Brodzinski, don't be nervous. I have only a couple of questions to ask you, and I will ask them real [fol. 872] easy. Okay?

Did you talk to Mr. Glenn since Saturday or last Friday?

A. I talked to him today.

Q. And you went over your testimony, didn't you?

A. Well, they asked me and I told them just what I told here in Court.

Q. Now, Mrs. Brodzinski, were you in the same room with your husband and Mr. Plevin at all times?

A. I wasn't in the same room. But it is an archway and therefore I heard everything.

Q. You could hear without any trouble?

A. Yes.

Q. Could you see without any trouble?

A. Yes.

Q. Were you in a position then where you could not only hear Mr. Plevin and your husband, but also see Mr. Plevin and your husband?

A. Yes.

Q. Then I presume you heard everything that your husband said?

A. Yes.

Q. And everything that Mr. Plevin said?

A. Yes.

Q. Was there anything that your husband said to Mr. Plevin with regard to changing any of the statement?

[fol. 873] A. Well, my husband started reading the statement. Well, that's when they went into the dining room to get a better light, and started reading the statement and glanced over a part of it, then all of a sudden he saw a mistake there.

Q. I am going to stop you—I will let you finish it—but at this point could you see them both, too?

A. Yes.

Q. And you could hear them both?

A. Yes.

Q. Now, you said all of a sudden he saw a mistake?

A. Yes.

Q. Now what happened then?

A. Then he told Mr. Plevin to change that part. The first part he just glanced over it and he told him to change that part. Then he sat down and read the rest of the testimony, or the statement, whatever you call it.

Q. He did tell him that he wanted something changed?

A. Yes.

Q. How many times did he tell him that?

A. Oh, about three times altogether, I think.

Q. And you heard him say, "This is wrong, I want it changed"?

A. Yes.

Q. And you saw Mr. Plevin make the change?

A. Yes.

Q. Then you saw your husband sign it?

[fol. 874] A. Yes.

Q. Then you heard him say that in another place?

A. Yes.

Q. And the change was made?

A. Yes.

Q. And your husband signed it?

A. Yes.

Q. Then you heard him say in another place, three altogether if that is your recollection?

A. Yes.

Q. Now, do you remember what those three changes were that your husband wanted to make?

A. I remember two perfectly well.

Q. Allright.

A. One was when Jim picked up his pant leg, the statement that Mr. Plevin wrote down was that it was bleeding, and my husband made him change it to there was blood around it.

Another one was that there were rats in the swamp, and my husband said there weren't any.

Q. I am giving you the statement, this is the one your husband signed; look it over for a minute and take your time.

A. Well, here Mr. Plevin omitted the steel sliver.

Q. I know, that is what your husband said, too. But take a look and see where it says about bleeding. When you get [fol. 875] to that part will you let me know, Mrs. Brodzinski?

A. Well, I heard that and I made my husband—my husband told him to change that. But it doesn't say so in here.

Q. Read the part that you said before was regarding blood where your husband told him to change it and he said the change.

A. Oh, you mean—

Q. This part. We will get to the next one. Read the part out loud about the blood.

A. (Reading) Pulled up his pants leg and showed me his leg. It was itching him, and when I looked at it it looked like a mosquito bite, only that the top of the skin was broken from scratching, and open with some blood about it. You could see it was flesh. He told me about it because it was bothering him. I told him to go see a doctor or go to the drug store.

Q. Up to there, on that page that is where you said that your husband told him to change the word from blood to bleeding, is that it?

A. No. From bleeding to blood.

Q. From bleeding to blood. And do you see any changes there, anything crossed out?

A. No, I don't, but I remember that.

Q. Did you say before or am I mistaken that your husband made him change that and signed the change, were [fol. 876] you mistaken or was I mistaken?

A. No, I am right, I am sure of that.

Q. You are sure that there was something there about blood?

A. Yes.

Q. And your husband signed it?

A. Yes.

Q. Now, will you look through there and see if there is anything in that statement about blood where your husband changed or signed the change, and take your time because I want you to be right, Mrs. Brodzinski. When you have finished looking it over, you tell me and then I have a question to ask you. But take all the time you need, Mrs. Brodzinski.

Have you finished it?

A. Yes, sir.

Q. Now, Mrs. Brodzinski, in this statement which you just looked at, there are three corrections as they appear in this statement which your husband asked to be made and apparently signed right next to the corrections, isn't that right?

A. (Witness nods.)

Q. One was changed from the sentence, "It was still there although it hadn't rained for" and the word "over" was stricken out and "about" a week was put in, isn't that right, and your husband signed it?

[fol. 877] A. Yes.

Q. Did you hear him talk about that?

A. Yes.

Q. And that was changed, wasn't it?

A. Yes.

Q. Then there was a word, "I never noticed the railroad to my knowledge make any attempt to get rid of these dead rats and pigeons about area or underneath the bridge;" then there is something crossed out, a word apparently crossed out in that sentence, isn't there?

A. Yes.

Q. And that is signed by your husband where the crossout was made, isn't it?

A. Yes.

Q. That is the second one. Now, the third one is a sentence, two sentences, but in between is written, in between the two sentences, "It was seasonal," do you see that?

A. Yes, yes.

Q. And apparently your husband said, he told him to put it it was seasonal?

A. Yes, that was on account of the bugs being around.

Q. That's right, we will read it then, "There will always be a lot of bugs or insects there at that muddy stagnant pool, but it would get worse at times depending on the time of the year," and then in between it says, "It was seasonal"?

[fol. 878] A. Yes.

Q. And he signed that?

A. Yes.

Q. Now, you have looked it over, you don't see any other corrections that were signed by your husband?

A. No.

Q. Now, you have looked over the part about the blood; did you see anything crossed out or changed on it about blood?

A. No, but I remember that.

Q. But there is nothing in here?

A. No.

Q. And you remember your husband telling Mr. Plevin to take it out or change it from blood to bleeding?

A. Yes—no, from bleeding to blood.

Q. And you say Mr. Plevin didn't do that?

A. Apparently he didn't.

Q. And your husband still signed the statement?

A. Yes.

Q. Did you watch your husband read this?

A. Well, when he first took it he just sort of glanced at it. And then when he saw that first mistake, then he started reading it.

Q. He didn't see the first mistake until the third page, there were no mistakes on the first two pages.

[fol. 879] Mr. Leasure: I object to that last question, your Honor. It has already been testified to here that there was a very grievous omission on the first page.

Mr. Dudnik: That is what we are getting to talk about, Mr. Leasure, if you will give me an opportunity.

Mr. Leasure: I think the question is assuming something that the evidence is contrary to.

The Court: Read the question.

(Last question was read by the reporter.)

Mr. Dudnik: The witness said that after he noticed the mistake he began to read it carefully, and I am just developing that.

The Court: Now this question says he didn't see any mistakes until the third page, is that what the question is?

Mr. Dudnik: Yes.

Mr. Leasure: It is a double-barreled question, your Honor. The first part of it is that, and then the second barrel of the question is there were no mistakes—

Mr. Dudnik: I will take the barrels out of it, your Honor, [fol. 880] and put my question without barrels.

Q. Do you see any corrections that your husband made on the first page?

A. No, I don't.

Q. Do you see any corrections that your husband made on the second page?

A. No.

Q. I take it the first correction your husband made was about a fourth down of the third page, is that right?

A. Well, that's what I mean, like sometimes somebody gives you a paper, you scan the first part and omit sometimes the very important thing in there, and then you happen to see something and really read it then.

Q. That is what you think your husband did?

A. Yes.

Q. I am going to ask you one more question, the same question Mr. Leasure asked Mr. Plevin. Do you and your husband depend upon the B & O Railroad for a living?

A. My husband works there, yes.

Mr. Dudnik: Thanks very much.

Redirect examination of Gladys Brodzinski:

By Mr. Leasure:

Q. A couple more questions, Mrs. Brodzinski. Does your husband have seniority on the railroad?

[fol. 881] A. Yes, he has.

Q. How much?

A. 17 years.

Q. Thank you. Secondly, did your husband tell Mr. Plevin about the steel splinter?

Mr. Dudnik: Objection. This is redirect. It has been asked twice.

The Court: Objection sustained.

Q. And did Mr. Plevin respond by mentioning the steel splinter himself?

Mr. Dudnik: Objection.

A. Yes.

The Court: Objection sustained.

Mr. Leasure: That is all.

OFFER IN EVIDENCE

Mr. Dudnik: I offer this statement in evidence now at this time, your Honor.

Mr. Leasure: I object.

The Court: Has it been referred to as an exhibit?

Mr. Dudnik: Yes, Plaintiff's Exhibit 25-A, 25-B, 25-C, and 25-D. It has been testified to by Mr. and Mrs. Brodzinski, they looked it over.

Mr. Leasure: Only certain parts.

Mr. Dudnik: I think it is proper to offer it in evidence.

[fol. 882] The Court: The objection will be sustained.

Mr. Dudnik: Thank you, thank you, Mrs. Brodzinski.

Mr. Leasure: Thank you very much, Mrs. Brodzinski. That is all we have, your Honor. We rest again.

Thereupon the defendant rested.

Thereupon the plaintiff rested.

Testimony closed.

* * * * * * *

[fol. 883] DEFENDANT RENEWS ITS MOTION FOR A DIRECTED VERDICT AND OVERRULING THEREOF

Mr. Leasure: At the conclusion of all the evidence the defendant renews its motion for a directed verdict in its favor, on the same ground and for the same reasons as stated on the motion made at the end of the plaintiff's case, being substantially failure of proof of a prima facie case by the plaintiff.

* * * * * * *

[fol. 886] The Court: At this time the Court will overrule the motion for a directed verdict by counsel for the defendant.

Mr. Leasure: Then I would like to take this up, your Honor, as I understand it there are two specifications of negligence remaining in the amended petition, I think numbers 4 and 6.

I would like at this time—I will do this severally—I would like to move to strike specification number 4 as not being supported by the proof at this stage of the proceedings, and also separately a motion to strike specification

number 6 for the same reasons, and further, in case the motion to strike number 6 is overruled, then alternatively we ask the Court to strike out from specification number 6 the words lice and vermin.

I haven't heard any testimony here about lice or vermin, [fol. 887] whatever that word may mean.

Mr. Dudnik: Vermin was used all over the place.

Mr. Hadden: What are they?

Mr. Nürenberg: Actually, vermin I think would include by definition dead pigeons, rats.

Mr. Leasure: I haven't heard of any vermin, I don't know whether rats and pigeons are vermin or not. But if they are then that is the only kind of vermin I have heard anything about.

Mr. Dudnik: Isn't that enough?

Mr. Leasure: I don't think so under the evidence.

The Court: Are you through?

Mr. Leasure: I am through with the motion.

COURT'S RULING ON MOTION TO STRIKE SPECIFICATIONS OF NEGLIGENCE

The Court: The Court will overrule your motion to strike specification number 4. The Court will grant your motion as to number 6, the second part of your motion dealing with the word "lice." The word "lice" will go out of the allegation of specification of negligence, in specification number 6.

Mr. Leasure: In other words, do I understand you are overruling my motion to strike number 6?

[fol. 888] The Court: And granting your motion in the alternative to strike the word "lice" from the specification.

* * * * * * *

[fol. 913] Tuesday morning session, 9:15 a.m.,
June 23, 1959

COLLOQUY

(Thereupon proceedings were resumed in the presence of the jury, as follows:)

The Court: Ladies and gentlemen of the jury, as you know, when I sent you back to the jury room yesterday,

and I told you that there were serious questions of law that have arisen in this case, and has required the attention of counsel on both sides of the table and the Court, we have been at this thing all afternoon yesterday and all morning this morning.

We have concluded with all the evidence in the case. I told you that when you went upstairs yesterday, I feel now that we are progressing to a point where we are going to get down to the final business in this case this afternoon.

I am asking you to take an early lunch so that we can get started early this afternoon. I wonder could you all be back here by 12:30?

Mr. Dudnik: I suggest, your Honor, there are some things that have to be typed up by the court—

The Court: We will take care of it. You get back by 12:30 if you can, and we will try to start as soon after 12:30 as is possible; once more with the admonition that [fol. 914] you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon an adjournment was taken to 12:30 p.m., June 23, 1959, at which time the following proceedings were had:)

. . . . . .

[fol. 927] STATEMENT BY COURT RE: INSTRUCTIONS

The Court: Defendant's objection to plaintiff's instruction which reads as follows is sustained:

"You are instructed as a matter of law that certain witnesses have been permitted to give their opinion in answer to a question based upon facts which the witness was asked to assume. Such questions are known in law as hypothetical questions and the facts which the law permits to be assumed by the witness are such facts as the evidence tends to prove."

Plaintiff's objection to Defendant's instruction which reads as follows is sustained:

"I charge you that a wild animal is an animal which by custom is not devoted to the service of mankind at the time and in the place in which it exists.

fol.929 "The word 'animal' as used here includes not only animals strictly so called, but also birds and insects.

"I further charge you that where wild animals (including birds and insects native to the region) exist in their natural state, the one owning or maintaining the property upon which they exist is not required to do anything to either remove them or to reduce them in numbers. This rule applies in this case."

Plaintiff's objection to Defendant's instruction which reads as follows is sustained:

"I charge you that the Plaintiff must prove each and every essential claim in his petition by the greater weight of the evidence.

"Plaintiff claims that his employer failed to furnish him with a reasonably safe place to work. All that is required of the employer is to furnish a place of work that is reasonably safe for persons in normal health, and persons without abnormal bodily conditions, unless the employer is shown to know or to have reason to know beforehand that the employee is not in normal health or suffers from some abnormal bodily condition. This rule applies in this case."

Plaintiff's objection to Defendant's instruction which reads as follows is sustained:

fol.929 "I charge you that an employer is not required to keep his premises free of insects, birds, and animals existing in a state of nature."

. . . . . .

fol.934 The Court: Members of the jury, before the arguments of counsel the Court gives to you certain propositions of law which are submitted in writing and which will be with you in the jury room.

These propositions of law are the law of the case, and you will consider them, together with the law I will give you in the charge at the close of arguments of counsel, as constituting the entire law of the case to be used by you

in reaching your conclusion, and to control you in your deliberations.

You are instructed as a matter of law that if you find from the evidence that underneath the Columbus Road bridge there existed a pool of stagnant water which contained dead pigeons, dead rats, and various kinds of [fol. 935] insects, and said condition existed for a sufficient period of time to be discovered and eliminated by defendant in the exercise of reasonable care, then under such circumstances the railroad is charged with notice or knowledge of such condition whether or not there was actual notice or actual knowledge to a responsible official, agent, or employee of the railroad.

You are instructed as a matter of law that the defendant owed plantiff the duty of exercising reasonable care to furnish him a safe place in which to work, and this duty was a continuing, non-delegable duty; and the defendant was not relieved from this duty even if you find from the evidence that plaintiff's work at the place in question was fleeting or infrequent.

If you find from the evidence that defendant did not discharge this duty to plaintiff, then you must find the defendant was negligent.

The B & O in this case was not required to guard against that which a reasonably prudent person, under the circumstances, would not anticipate as likely to happen. If a person has no reasonable ground to anticipate that a particular condition, no matter what it may be, would or might [fol. 936] result in a mishap and injury, then the party is not required to do anything to correct such a condition. You must apply this rule to this case.

In measuring the B & O's duty to anticipate—that is, in considering how much and how far the defendant ought to have gone in foreseeing and guarding against possible mishaps and dangers—the past experience respecting the location and conditions in question may properly be drawn upon. It is entirely proper in this case to take into account the fact, if you find it to be a fact, that no occurrence of the kind here alleged either occurred, or was known by defendant to have occurred, at or near this place before

August of 1954, as bearing upon and indicating what the defendant here should reasonably have foreseen for the future.

If you find from the evidence that defendant is negligent and such negligence was an approximate cause of damage to the plaintiff, then defendant is liable for all consequences proximately resulting from such negligence, even if you find from the evidence that defendant neither foresaw nor should have foreseen the extent or nature of such damage.

I charge you that the B & O is not an insurer against all mishaps to plaintiff which might occur on its [fol. 937] premises; nor was the B & O required to maintain its property in a perfectly clean or sanitary condition; nor was it required to keep its premises free of all water, pigeons, rats or insects. Defendant's duties are measured by what is reasonably foreseeable under like circumstances.

I charge you that the taking of special precautions against a danger or risk of injury that is only remotely possible is not required of an employer. Likewise, the B & O is not to be held here to an unreasonable degree of care, nor to the performance of practical impossibilities.

You are instructed as a matter of law that the term "injury" as used in the Federal Employers Liability Act under which this action has been brought and is governed, includes any illness, disease, or condition of ill-being of the plaintiff which you find from the evidence the negligence if any of defendant even in the slightest degree was a proximate cause.

I charge you that the facts standing alone that Mr. Gallick was bitten or stung by an insect on B & O premises, and that he was injured or infected thereby, even if proven, do not mean necessarily that plaintiff's place of work was [fol. 938] not reasonably safe. The mere happening of a bite or sting on B & O premises, and injury or infection therefrom, even if proved, do not establish that the place of work was unsafe.

The burden is upon plaintiff to prove all essential elements of fact to a probability, and by the greater weight of the evidence. And the cause of injury and damage must be proved to a probability, and not by guess or conjecture.

I charge you that in measuring what the B & O should have done, or should not have done in this case, it is not fair or proper to take a point of view after the occurrence or to consider the railroad's conduct in the light of after events. In measuring the B & O's conduct here, the point of view to be taken should be the view before the mishap occurred, to see what, in the light of the facts then known, should or could reasonably have been anticipated. And you must follow this rule in this case.

You are instructed as a matter of law that in determining whether the damage, if any, suffered by the plaintiff was proximately caused by the negligence, if any, of the defendant, the law requires only that you find from the evidence a reasonable probability that plaintiff sustained such damage, if any, by reason of the negligence, if any, [fol. 939] of the defendant.

In determining what amount of money will fully, fairly and adequately compensate plaintiff you should consider such of the following elements of damage as you may find from the evidence:

The pain and suffering of body and mind, if any, which plaintiff has endured to the present, and such pain and suffering of body and mind, if any, as you find with reasonable medical certainty that plaintiff will endure in the future;

The loss by plaintiff of the use, function and enjoyment of his legs up to the present, and such future loss of use, function and enjoyment of his legs and ability to get about, if any, as you find with reasonable medical certainty plaintiff will sustain in the future;

Such pain, suffering, inconvenience and disability, if any, that plaintiff has endured by reason of surgical procedures performed upon his person, and such pain, suffering, inconvenience, and disability if any as you find with reasonable medical certainty that plaintiff will endure in the future;

The medical care, attention, therapy and treatment, if any, which plaintiff has undergone to the present, and [fol. 940] such future medical care, attention, therapy and treatment, if any, which you find with reasonable medical certainty plaintiff will undergo in the future;

Such humiliation, cosmetic disfigurement, mental anguish and nervous shock, if any, which plaintiff has endured to the present, and such mental anguish, humiliation, cosmetic disfigurement, and nervous shock, if any, which you find with reasonable medical certainty plaintiff will endure in the future;

Such pain, suffering, and disability if any which plaintiff has sustained by reason of various narcotics, administered orally or by injection to his person, and such pain, suffering, and disability if any as you may find with reasonable medical certainty he will suffer in the future by reason of narcotics administered orally or by injection;

The impairment, pain, suffering, and disability, if any, which he has sustained in the use, function and enjoyment of his right arm to the present, and such pain, suffering, and disability if any as you may find with reasonable medical certainty he will incur in the future in the use, function, and enjoyment of his right arm;

The reasonable cost of any necessary hospital confinement [fol. 941] and medical or surgical treatment, therapy, care and attention incurred to the present time, and the reasonable cost of any necessary hospital confinement if any which you may find with reasonable medical certainty will be incurred in the future;

The reasonable value of any loss of wages which plaintiff may have sustained to the present, if any, and such future loss of wages, if any, as you find with reasonable certainty plaintiff will sustain in the future, which sum, however, shall be reduced by you to its present value;

And such permanent disability, if any, with which you find plaintiff has been afflicted to the present, and such permanent disability, if any, that you find with reasonable medical certainty plaintiff will be afflicted in the future.

In any event, however, such sum of money cannot be in excess of the sum prayed for by plaintiff in his amended petition, which in this case is the sum of $750,000.

Mr. Dudnik?

(Thereupon counsel for plaintiff made his opening argument to the jury, as follows:)

. . . . . .

[fol. 988] Wednesday morning session, 10:15 a.m.,
June 24, 1959

(Thereupon proceedings were resumed in the absence of the jury, as follows:)

DEFENDANT'S REQUESTS FOR SUBMISSION OF SPECIAL INTERROGATORIES TO JURY

Mr. Leasure: At this time let the record show that the defendant is filing and offering to the Court requests for submission of special interrogatories to the jury.

Those interrogatories are offered separately and severally, as to the interrogatory appearing on each page.

They are numbered 1 through 15. However, there appears under the heading number 2 numerous interrogatories numbered 2-A through 2-U, and each of those is offered separately and individually, as well as the remaining interrogatories.

I want to also add to the record that a copy of these interrogatories has been in the hands of the Court since two days ago, Monday afternoon, which would be June 22nd, this being June 24th.

Mr. Dudnik: Let the record show, I am entering an objection to the offering of the interrogatories, as well as the submission of them.

Mr. Leasure: Judge, I think I should state that I read [fol. 989] into the record the offer of the special interrogatories.

The Court: Yes, the court reporter has told me that, and that is what I want to consider.

Number one, I want you to understand, I want counsel on both sides to understand that at the closing of arguments yesterday Mr. Leasure repronounced the general objection to plaintiff's counsel's argument to the jury, and the Court withheld the ruling on that objection until this morning and the Court is now overruling that objection.

Now, as I understand it, Mr. Leasure has dictated to the reporter the interrogatories that he has submitted to the Court this past couple of days ago—was it Monday?

Mr. Leasure: It was two days ago, your Honor. I didn't read them into the record.

The Court: You referred to them.

Mr. Leasure: I referred to them and offered them, presented them in effect to the Court and described the number of them and explained that I was offering each one separately and individually.

By each one I mean the one appearing on each page. So that even though several are numbered 2, namely, 2-A, [fol. 990] 2-B, 2-C, and so forth, each of those are offered individually as well as severally.

The Court: To that I understand counsel for plaintiff has objected. The Court will sustain the plaintiff's objection, excepting as to the following interrogatories.

Mr. Nurenberg: May we have just a moment, your Honor?

The Court: Yes. Ready?

Mr. Dudnik: Yes, your Honor.

The Court: 2-F. 2-G.

Mr. Nurenberg: These are the ones being given?

The Court: That's right. 2-F. 2-G-1, and 2-G-4. 2-I-1. 2-J-1. 2-K-1. 2-P. 2-Q. 2-T. 3-A. 5-A and 5-B. 6-A and 6-B. 7-A. And 15.

Mr. Nurenberg: May we be heard on any of these, your Honor?

The Court: Yes, you may be heard.

Mr. Dudnik: May we read them first?

The Court: What is that?

Mr. Dudnik: May we read them now?

The Court: Yes.

I wonder if we may do this to save time. I am going to have these typed up, and I would like to call the jury down [fol. 991] and let them go to lunch, so that we can start at an early hour as quickly as possibly.

Mr. Leasure: Your Honor, I want to make sure I understand. I don't know exactly mechanically how these submitted interrogatories are handled, whether they are

marked, filed and put in with the original papers in the case or what.

I just want to make sure I do whatever is necessary for that. All of the interrogatories that I have submitted do become part of the original papers in the case. So that then by reference thereto it will show what interrogatories have been rejected by the Court.

The Court: They will be filed and made a part of the record in the case. However, only those that the Court is now referring to will go to the jury.

Mr. Leasure: Yes, I understand that.

Mr. Nurenberg: May I ask this, your Honor, before voicing our objection, whether these interrogatories are being submitted as interrogatories under the interrogatory statute, or are they being submitted as a special verdict?

The Court: They are being submitted as interrogatories.

Mr. Nurenberg: Under 2315.16?

[fol. 992] The Court: Yes.

Request for Special Interrogatories

(Thereupon counsel for defendant submitted to the Court the following Request for Special Interrogatories:)

"Now comes the defendant and requests that the Court submit to the jury the attached interrogatories to be answered by the jury in conformity with the statute. These are submitted severally."

Interrogatory No. 1

Has it been proved by a preponderance of the evidence that Mr. Gallick was bitten or stung by an insect at the Columbus Road bridge of defendant in August, 1954?

Answer: .....

Interrogatory No. 2

If your answer to No. 1 is "Yes," answer the questions that follow. If the answer is "No," do *not* answer the following questions. If you answer the following, and find that there are some questions that you cannot answer, please so state:

2(a) What kind of insect was it?
Answer: .....

[fol. 993] Interrogatory No. 2 (b)

What were the insect's feeding and living habits?
Answer: .....

Interrogatory No. 2 (c)

What was the insect's size, shape and construction?
Answer: .....

Interrogatory No. 2 (d)

Was the insect winged or crawling?
Answer: .....

Interrogatory No. 2 (e)

Where had the insect originated?
Answer: .....

Interrogatory No. 2 (f)

Was the insect the same kind as lived generally in this area, both on and off B & O property?
Answer: .....

Interrogatory No. 2 (g) (1)

Was it inside of his trouser leg at the time of the bite or sting?
Answer: .....

[fol. 994] Interrogatory No. 2 (g) (2)

If so, how did it get there?
Answer: .....

Interrogatory No. 2 (g) (3)

Where was it just prior to setting on Mr. Gallick?
Answer: .....

Interrogatory No. 2 (g) (4)

How long did it take it to go from the place it first got on Mr. Gallick to the point where it bit or stung him?

Answer: .....

Interrogatory No. 2 (h) (1)

Can you say for how long the insect had been on B & O property, if at all, prior to getting on Mr. Gallick?

Answer: .....

Interrogatory No. 2 (h) (2)

If so, for how long?

Answer: .....

Interrogatory No. 2 (h) (3)

If so, where on B & O property had it been for that length of time?

[fol 995] Answer: .....

Interrogatory No. 2 (i) (1)

Has it been proved that the B & O did something that caused this particular insect to be on Mr. Gallick at the time and place in question?

Answer: .....

Interrogatory No. 2 (i) (2)

If so, what?

Answer: .....

Interrogatory No. 2 (j) (1)

Has it been proved that the B & O failed to do something that caused this particular insect to be on Mr. Gallick at the time and place in question?

Answer: .....

Interrogatory No. 2 (j) (2)

If so, what?

Answer: .....

Interrogatory No. 2 (k) (1)

Has it been proved by a preponderance of the evidence that it was the kind of a bug or insect that would be expected to attack man?

Answer: .....

[fol. 996] Interrogatory No. 2 (k) (2)

If so, what are its habits in that regard?

Answer: .....

Interrogatory No. 2 (l) (1)

Has it been proved that any result other than possibly minor and temporary discomfort was ordinarily to be expected from this kind of insect bite or sting upon an adult?

Answer: .....

Interrogatory No. 2 (l) (2)

If so, what?

Answer: .....

Interrogatory No. 2 (m) (1)

Was an ulcerated skin condition, or any other substantial or disabling injury or disease, a result normally and usually to be expected to an adult from the bite or sting of the kind of insect or bug here involved?

Answer: .....

Interrogatory No. 2 (m) (2)

If so, state exactly what effect could be normally and usually expected upon an adult from such an insect's bite or sting?

Answer: .....

[fol. 997] Interrogatory No. 2 (n) (1)

Has it been proved here that the B & O had prior reason or cause to anticipate or expect that one or more of its employees would be bitten or stung by this kind of an insect at the time and place in question?

Answer: .....

Interrogatory No. 2 (n) (2)

If so, state exactly why and how?

Answer: .....

Interrogatory No. 2 (o)

Has it been proved here that the B & O knew or should have known:

(1) That this insect was upon its premises?

Answer: .....

(2) That this insect had dangerous and injurious propensities toward humans?

Answer: .....

Interrogatory No. 2 (p)

Is it just as likely that the presence of the insect on Mr. Gallick's body was due to conditions off B & O property as to conditions on their property?

Answer: .....

[fol. 998] Interrogatory No. 2 (q)

Is it just as likely that the presence of the insect here involved was due to normal and usual conditions to be found in August on most industrial or vacant property near a city river, as to any particular conditions complained of on B & O property?

Answer: .....

Interrogatory No. 2 (r) (1)

Did the B & O have any reasonable cause to know or believe that the condition of its premises at the time and place here in question would probably result in injury of the kind here complained of to one of its employees?

Answer: .....

Interrogatory No. 2 (r) (2)

If so, state the cause for such belief, and the kind of injury to be anticipated.

Answer: .....

Interrogatory No. 2 (s) (1)

Did the condition of the B & O premises here present a danger to its employees that was substantially different or greater than the risk of insect bite by insects living elsewhere in the same vicinity?

Answer: .....

[fol. 999] Interrogatory No. 2 (s) (2).

If so, was the danger of an injurious insect bite still only a remotely possible danger?

Answer: .....

Interrogatory No. 2 (t)

Was the insect here involved a kind native to Ohio and living wild in nature?

Answer: .....

Interrogatory No. 2 (u) (1)

Did the B & O have prior notice or knowledge that the insect here involved was living on its premises in the area involved?

Answer: .....

Interrogatory No. 2 (u) (2)

If so, did the B & O have prior notice or knowledge that such insect had a natural propensity to attack man, and to cause a real and substantial injury as distinguished from a mere momentary and temporary discomfort?

Answer: .....

[fol. 1000] Interrogatory No. 3 (a)

Are the same kinds of bacteria found on and in rats and pigeons as are found on and in humans?

Answer: .....

Interrogatory No. 3 (b)

If "No" state the difference in kinds.

Answer: .....

Interrogatory No. 4 (a)

Was plaintiff's first skin infection due to a kind of bacteria known as staphylococcus?

Answer: .....

Interrogatory No. 4 (b)

If "No" state what kind of infection it was.

Answer: .....

Interrogatory No. 4 (c)

If "Yes" is this a common kind of bacteria found:

(1) On humans? .....

(2) On clothing? .....

(3) On tabletops? .....

(4) On floors? .....

(5) In the air? .....

(6) Practically everywhere? .....

[fol. 1001] Interrogatory No. 5 (a)

Where on plaintiff's body was his first skin infection?

Answer: .....

Interrogatory No. 5 (b)

Is it just as likely that such infection came from scratching or rubbing an insect bite or other skin eruption as from an insect bite itself?

Answer: .....

Interrogatory No. 6 (a)

Can you state the cause of Mr. Gallick's ulcerated skin condition?

Answer: .....

Interrogatory No. 6 (b)

If "Yes" so state.

Answer: .....

Interrogatory No. 6 (c)

If "Yes" state how such cause operated to produce Mr. Gallick's physical condition.

Answer: .....

[fol. 1002] Interrogatory No. 7 (a)

Was the plaintiff's place of work reasonably safe for the plaintiff?

Answer: .....

Interrogatory No. 7 (b)

If "No" state why.

Answer: .....

Interrogatory No. 8 (a)

Was plaintiff's place of work reasonably safe for a person in good health and without any unusual bodily conditions or allergy?

Answer: .....

Interrogatory No. 9

Did the B & O have any reason to know that Mr. Gallick was not in good health or had any abnormal bodily conditions or allergy?

Answer: .....

Interrogatory No. 10 (a)

Is plaintiff's physical condition since August, 1954, an allergic reaction, or other unforeseeable individual reaction, to an insect bite or sting?

Answer: .....

[fol. 1003] Interrogatory No. 10 (b)

If "No" state the medical cause of his condition.

Answer: .....

Interrogatory No. 11 (a)

Do you know how and why plaintiff's first ulcer developed?

Answer: .....

Interrogatory No. 11 (b)

If "Yes" state exactly how and why.

Answer: .....

Interrogatory No. 12 (a)

Do you know why plaintiff's first ulcer did not heal up routinely when treated?

Answer: .....

Interrogatory No. 12 (b)

If "yes" state why.

Answer: .....

Interrogatory No. 13 (a)

Do you know how and why plaintiff's other ulcers developed?

Answer: .....

[fol. 1004] Interrogatory No. 13 (b)

If "Yes" state exactly how and why.

Answer: .....

Interrogatory No. 14

List the items going to make up plaintiff's damages, and show the amount allowed for each item.

Answer: .....

Interrogatory No. 15

What is plaintiff's present life expectancy in view of his present condition?

Answer: .....

. . . . . .

[fol. 1038] Wednesday afternoon session,
1:00 p.m., June 24, 1959

(Proceedings were resumed in the absence of the jury, as follows:)

The Court: Upon reconsideration the Court now sustains Mr. Dudnik's objections to the introduction of the interrogatories presented by the defendant except for the following—and here are copies, gentlemen—5-a and 2-g-1.

As to 2-g-1, the Court now strikes from this question the word "it" and inserts in its place thereof the word "insect" so that the jurors may better understand the question.

In this case the Court has found that properly applied mandatory duties imposed upon it by the statutes of Ohio in conjunction with the Federal Employers Liability Act, under which this case is brought. Ordinarily a State's procedure of law which would divest the plaintiff in a Federal Liability Act case in a jury trial, has been held to be improperly applied when the plaintiff was denied a jury trial.

Keeping this in mind, the Court has prepared the special verdict in such a way that it conforms to the statutes of Ohio, and conforms to the requirements imposed by the cases under the Federal Employers Liability Act.

[fol. 1039] This means that the Court in reading Section 2315.16 of the Ohio Revised Code, in the light of the Federal Employers Liability Act, has considered the words "Each determinative issue to be tried by the jury," in its broadest possible form, so that the plaintiff will not be denied a complete and comprehensive finding by the jury, nor will the defendant be denied a right granted him by the statutes to have the jury make a special verdict.

This, therefore, limits the questions to be asked under Section 2315.16.

Gentlemen, in order not to confuse the jury, I have replaced Page 2 of the petition with a new Page 2, which will go with the pleadings to the jury. You each may have a copy.

Mr. Leasure: Note our exceptions to the Court's ruling on the special interrogatories.

Let the record show that the defendant at this time is withdrawing Interrogatory 2-g-1, for the reason that standing alone it is meaningless, and, secondly, standing alone it assumes something that is not admitted.

[fol. 1040] CHARGE OF THE COURT

COHEN, J.: Ladies and gentlemen of the jury, before I give you the special verdict and the necessary law in this case, may I preface my charge by saying to you that this has been an unusually prolonged case. It has lasted over two weeks and I want to commend you for your patience and sincere interest.

I have watched you folks during the entire course of this trial, and as has been commented on by counsel this is a very important duty that you have to render as jurors. The Court wants to thank you for your services.

I also want to thank counsel on both sides of the table for their courtesy in handling this case, and I want to say to the clients of counsel on both sides that they have been very well represented. Counsel have prepared the case sincerely and thoroughly.

Ladies and gentlemen of the jury, when requested by either party the Court is required to direct the jury to return a special verdict. Such a request has been made in this case, and the Court therefore instructs you to return a special verdict in writing upon all of the determinative issues in this case.

[fol. 1041] Many of you are familiar with the general verdict. So perhaps it will be clearer if the Court explains the difference between a general verdict and a special verdict.

A general verdict is one by which the jury simply makes a finding for the plaintiff or for the defendant. Under the general verdict procedure the Court furnishes a jury all of the law applicable to the case, and the jury applies that law to the facts, and determines which party is entitled to recover.

With a general verdict the jury is only required to express its conclusion for the plaintiff or for the defendant, and insert an amount if either party is entitled to money.

A special verdict is one by which the jury separately determines the issues, but does not make a general finding for either party.

In a special verdict the jury sets forth findings of determinative issues, determining all the issues which the case presents. The Court thereafter decides whether the plaintiff or the defendant is entitled to a judgment.

You are instructed that such a verdict must contain all [fol. 1042] the determinative issues in the case. In other words, by answering certain questions you will make findings of determinative issues that resolve the issues, and the Court will decide whether the final verdict is for the plaintiff or the defendant.

Facts which you fail to include in your verdict, or upon which you cannot agree, are considered as not established and may not be considered by the Court in applying the law and reaching a judgment for either party.

Since I have used the phrase determinative issues, I will attempt to explain that to you.

A special or determinative issue is a statement of ultimate fact controverted in an answer. Therefore, in coming to a conclusion as to what a determinative issue in this case is, you, the jury, must find facts from the evidence which have been presented in this court room.

The Court will furnish the jury with sufficient law to determine the credibility of witnesses, to weigh and determine the preponderance of the evidence, and in addition it will give to the jury such specific law as is necessary [fol. 1043] to enable the jury to determine the issues.

The Court will not furnish the general law of the case, since the general law of the case will be applied by the Court in rendering judgment.

This special verdict procedure provides for a separation of the functions of the Court and the jury.

Your deliberations will be concerned with a fair and impartial determination of the determinative issues, and not the result of your findings. Avoid all consideration as to which party may ultimately prevail.

The determinative issues in this case have been prepared in a series of questions which you will be expected to answer.

I will now read each of these questions to you. Most of the questions can be answered yes or no. A few of the questions being with the language, "If the answer to." These questions then refer to former questions which may have been answered yes. If the answer to the former question was yes, then answer the question you are considering either yes or no.

If the answer to the former question was no, then answer the question you are considering no answer necessary.

[fol. 1044] There is one question here, namely, question No. 17, which requires you to do more than answer yes or no. When you come to question No. 17, it is suggested that you again read the petition of the plaintiff before you attempt to answer this question.

I shall now read these questions to you.

We, the jury being first duly empaneled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

1. Did a pool of stagnant water exist under the Columbus Road bridge during the entire early part of August, 1954?

2. Was the pool of stagnant water on the premises of the defendant B & O?

3. If the answer to 2 is yes, was the defendant B & O in possession of the premises under the Columbus Road bridge whereon the stagnant water stood?

4. Did the defendant B & O have under its control the premises under the Columbus Road bridge wherein the stagnant water stood?

5. If the answer to question No. 2 is yes, did dead pigeons accumulate under the bridge in the stagnant water?

[fol. 1045] 6. If the answer to No. 2 is yes, did dead rats accumulate under the bridge in the stagnant water?

7. If the answer to No. 2 is yes, did vermin accumulate under the bridge in the stagnant water?

8. If the answer to No. 2 is yes, did bugs accumulate under the bridge in the stagnant water?

9. Was the plaintiff required to perform his work duties in close proximity to the area referred to in question No. 1?

10. On approximately August 10, 1954, was plaintiff bitten by an insect?

11. If the answer to question No. 10 is yes, was he bitten while performing his usual and customary work duties?

12. If the answer to No. 10 is yes, was he bitten near or about the Columbus Road bridge?

13. Did the defendant B & O provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?

Now, in dealing with the answer to this question, you must keep in mind that the Federal Employers Liability Act is not a scheme of workmen's compensation, nor does [fol. 1046] it make the railroad an absolute insurer of its premises.

By a safe place to work the Court instructs you as a matter of law, that in this case that means the railroad must maintain its tracks and premises in the same manner as a reasonable man ought to maintain them in the circumstances there prevailing, having in mind the standard of care must be commensurate to the dangers of the business, and is measured by what is reasonable and ordinary care and by what is reasonably foreseeable under the circumstances.

14. If the answer to question 1 is yes, did the defendant B & O know that by permitting the accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs, and vermin would be attracted to said area?

15. If the answer to 14 is yes, did the defendant B & O know that its employees would have to work in this area?

16. Was the defendant negligent in one or more of the particulars alleged in the petition?

It is a general rule of law that negligence is never presumed, but that the party claiming negligence must prove the same by the greater weight or the preponderance of [fol. 1047] the evidence. You will recall that we have pre-

viously defined what is meant by the greater weight or the preponderance of the evidence.

Negligence is sometimes said to be a failure to observe for the protection of the rights of others that degree of care, precaution, and vigilance which the circumstances justly demand, and sometimes, in other words, it is said that negligence is the failure to observe ordinary care, and ordinary care is that degree of care which people of ordinary prudence and sagacity use under the same or similar circumstances. What would ordinarily prudent persons have done under like circumstances?

17. If the answer to question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence.

18. Was the illness or disease from which Mr. Gallick now suffers caused in whole or in part by an insect bite sustained by him on defendant B & O's premises?

19. Were the injuries to the plaintiff proximately caused in any part, even the slightest, by any one or more of the acts or omissions of the defendant?

[fol. 1048] 20. If the answers to any one of the questions numbered 1, 5, 6, 7 and 8 is yes, was there any reason for the defendant B & O to anticipate that such would or might probably result in a mishap or an injury?

In answering this question you are instructed that it is a matter of law the defendant B & O is only to be held to a reasonable degree of care, and not to the performance of practicable impossibilities, but that where the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, introducing the injury, then the employer has a duty to anticipate that such injury would or might probably result.

21. Is there a proximate causal relationship to the stagnant water, the dead rats, the dead pigeons, the insect bites, and the present physical condition of the plaintiff?

22. If the answer to question 21 is yes, was it within the realm of reasonable probability or foreseeability of

the defendant B & O to appreciate this proximat causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?

[fol. 1049] 23. What amount of money will compensate the plaintiff, James J. Gallick, for his injuries and damages, if any, resulting proximately from this accident?

To assist you in your work, the Court is going to send to you the pleadings in this case. The pleadings consist of a so-called amended petition of the plaintiff, the answer to the amended petition of the plaintiff by the defendant, and a reply to that answer by the plaintiff.

The purpose of these pleadings is to narrow the issues between the parties. The Court will now read the pleadings to you.

I am now reading the amended petition of the plaintiff.

"Now comes the plaintiff and after having duly obtained leave of court files this, his amended petition.

"Plaintiff for his cause of action says that at all times herein alleged, the defendant was and is a railroad corporation, organized and existing under the laws of the State of Maryland, and was at the time of the occurrence herein set forth, and is now carrying on its business as an interstate common carrier of passengers and freight within the [fol. 1050] jurisdiction of this Court.

"That at all times herein alleged plaintiff was and is a resident of the City of Parma, County of Cuyahoga, and State of Ohio, employed by the defendant as a yard foreman in which capacity the plaintiff was engaged in the movement, switching, and classification of freight cars on tracks of the defendant located in the vicinity of Lime Road and the Columbus Road bridge in the City of Cleveland, County of Cuyahoga, State of Ohio.

"That the action of plaintiff is brought under and is governed by the provisions of the Federal Employers Liability Act, 45 U.S.C.A., Section 51-59, and amendments thereto.

"Plaintiff further says that in the month of August, 1954, the exact date and time being uncertain, he was engaged in the performance of his duties involving the movement, switching, and classification of railroad freight cars at

defendant's tracks located in the vicinity of Lime Road and Columbus Road bridge in the City of Cleveland, County of Cuyahoga, State of Ohio.

"That in close proximity to said tracks, in August of 1954, and for a long time prior thereto, to the knowledge [fol. 1051] of the defendant there existed a pool of stagnant water on premises in the possession of and under the control of defendant, into which was accumulated dead pigeons, rats, and various forms of bugs and vermin.

"That plaintiff was required to perform his work duties in close proximity to said area.

"That in the month of August, 1954, while performing his usual and customary work duties in and about the Columbus Road bridge and Lime Road tracks of the defendant, the plaintiff was bitten by an insect following which he developed serious painful and disabling injuries, as will be described hereinafter.

"Plaintiff further says that the defendant was negligent in the following respects:

"4. In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties.

"6. In that it knew that by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs, and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions.

"Plaintiff further says that by means of and in con- [fol. 1052] sequence of the foregoing negligent acts and omissions of the defendant, and as the direct and proximate result thereof, he was caused to be bitten by an insect which caused his system to become poisoned, and which resulted in the formation of deep acute ulcerations, with drainage about his extremities and body, which condition has not abated with time.

"Plaintiff further says that as a result of his injuries it has been necessary for him to undergo extensive hospitalization, medical care and attention and surgery, for all of which he has sustained expense, the full extent and amount of which is as yet unascertainable, inasmuch as

plaintiff is receiving medical care and attention and hospitalization at the time of filing this, his amended petition.

"Plaintiff further says that his injuries have necessitated surgery for the amputation of both legs, that he is confined to his hospital bed, and a wheelchair, and will remain so into the indefinite future.

"Plaintiff further says that his injuries have caused him to suffer an extreme weight loss, and necessitated that he consume large quantities of narcotics in an attempt [fol. 1053] to relieve his pain.

"Plaintiff further says that as a result of his injuries he has suffered and will suffer permanently from pain, great mental anguish, extreme nervousness, and inability to obtain normal rest, weight loss, cosmetic disfigurement and inability to get about, and extreme worry, grief and anxiety.

"Plaintiff further says that his injuries have rendered him an invalid, and that he needs constant care and attention to his person.

"Plaintiff further says that prior to the foregoing occurrence he was regularly employed, earning and capable of earning substantial wages, but that as a result of his injuries as aforesaid he has been rendered totally incapacitated from resuming his railroad occupation or any other gainful occupation, which condition will continue into the indefinite future, by means of and in consequence of which plaintiff has been injured and damaged in the sum of $750,00.

"Wherefore plaintiff prays judgment from the defendant herein in the sum of $750,000," and signed by his attorney.

Answer to amended petition.

[fol. 1054] "First defense. Now comes the defendant and for his its first separate defense to plaintiff's amended petition, admits that it is a railroad corporation, organized and existing under the laws of the State of Maryland, and maintains certain tracks in the vicinity of Lime Road and the Columbus Road bridge in the City of Cleveland, Ohio.

"Admits that during the month of August, 1954, plaintiff was employed by defendant in the capacity of yard foreman and yard helper, engaged in the movement, switching and

classification of freight cars over certain tracks of defendant located in the City of Cleveland.

"Admits that plaintiff's cause of action is brought under the provisions of the Federal Employers Liability Act, 45 U.S.C.A., Paragraph 51-59, as amended, and admits that plaintiff's duties as a yard foreman and yard helper were in furtherance of interstate commerce.

"Not intending to deny that plaintiff may have been required in the course of his duties as yard foreman, or yard helper, to be present from time to time during the month of August, 1954, at or near the tracks of defendant [fol. 1055] which are located in the vicinity of Lime Road and the Columbus Road bridge, or that plaintiff has suffered from a serious and painful disability subsequent to August, 1954, defendant does deny for lack of knowledge that there existed at that time a pool of stagnant water or other unsanitary condition for which the defendant was responsible in the vicinity of its tracks at Lime Road and the Columbus Road bridge.

"Denies that plaintiff's illness or disease was proximately caused or contributed to by the negligence of the defendant, its agents, servants, or employees, either in the respects alleged in the amended petition, or in any other manner, and specifically denies the existence of any connection whatsoever between the condition of defendant's tracks and roadbed, and the insect bite allegedly sustained by plaintiff while employed as a yard foreman or yard helper for defendant during the month of August, 1954.

"Further answering, defendant says that if it be true that the illness or disease from which plaintiff now suffers was caused or contributed to by an insect bite sustained by him on defendant's premises or elsewhere, the likelihood [fol. 1056] of harm and consequences to plaintiff therefrom were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose requiring the exercise of care by defendant to protect plaintiff from any such risk.

"And defendant further says that if it should be found that such risk should have been foreseen by this defendant, no reasonable method or means was available to it which

could have eliminated control or appreciably reduced the numbers or types of insects in and about its premises.

"Further answering, defendant denies each and every allegation contained in plaintiff's amended petition, save and except those hereinabove expressly admitted to be true.

"Second defense. For its second separate defense to plaintiff's amended petition, defendant incorporates herein by reference and makes a part hereof the preceding portions of this, its answer, and says that if it should be found that plaintiff's disability was caused in whole or in part by the negligence of this defendant, which defendant specifically denies, then neither said disability nor the insect bite which is claimed to have occasioned it, constitutes an [fol. 1057] injury within the meaning of the Federal Employers Liability Act, and that plaintiff may not recover in this action.

"Wherefore, having fully answered, defendant prays that plaintiff's amended petition be dismissed, and that it may go hence with its costs without day."

And signed by counsel for the defendant.

The reply of the plaintiff to the defendant's answer:

"For his reply to the answer of the defendant to plaintiff's amended petition, plaintiff denies each and every fact, statement, and allegation contained therein, save and except such as are an admission of a fact, statement or allegations contained in the amended petition of plaintiff.

"For his further reply plaintiff realleges and reavers the facts, statements, and allegations contained in his amended petition, and prays for judgment as in his amended petition he has prayed."

Ladies and gentlemen of the jury, when I read question No. 18 referring to determinative issues, I failed to give you the law that affects that question, and I now give the law to you.

You are instructed as a matter of law that the term injury as used here includes any illness, disease or condition of ill-being of the plaintiff which you find from the evi- [fol. 1058] dence the negligence, if any, of the defendant, even in the slightest degree, was a proximate cause. By

proximate cause the Court means direct cause of such injury, or that the injury must stand in the immediate relation of cause and effect.

In a reading of the pleadings we are thus able to determine certain issues which are not disputed. Therefore, you do not have to decide these issues and need not be concerned with them. The Court will now give you certain law to apply in this case.

First, as the sole judges of the facts you are also the sole judges of the credibility of the witnesses and the weight to be given their testimony.

In reaching a conclusion as to this, you have the right to and should consider the candor or lack of candor of each witness while testifying, his interest in the outcome of the lawsuit, his bias or lack of it, the probability of his knowing the truth of the facts and circumstances concerning which he has testified, and every other factor developed during the trial which will enable you to determine the degree of credibility which you will assign to each witness.

[fol. 1059] As a matter of law, you may believe a portion of the testimony of a particular witness and disbelieve the rest of the witness' testimony.

You are privileged to believe all of the testimony of a particular witness, or you may disbelieve all of the testimony of a particular witness.

There have been expert witnesses testified in this case, and you are to apply to their testimony the same tests that you apply to the testimony of other witnesses. And in addition thereto consider the experience, skill, and education, the knowledge and impartiality of this witness, and give to the testimony of each of them such weight as in your honest judgment it is fairly entitled to receive.

Hypothetical questions, that is, questions based on supposition have been propounded to the expert witnesses.

In order that this testimony shall be of any value, all of the facts which were assumed for the basis of forming such question, and for determining the opinion, should be found by you to be true. The truth of said supposition in the question contained is for your determination from the evidence.

Second, in this case it is incumbent upon the plaintiff to prove by the preponderance of the evidence the allegations [fol. 1060] in his petition.

By a preponderance of the evidence is meant simply the greater weight of the evidence, more convincing force and probative value. It is that evidence that carries the greater probability of truth, that you more readily believe, that is more convincing to your minds.

It does not necessarily mean the greater number of witnesses. It is your duty to carefully examine all of the evidence offered on both sides of any issue. Having done that, if the one having the burden, which is the plaintiff in this case, has evidence that carries more conviction to your minds, the greater probability of truth, is more convincing, then it may be said that he has proven those issues by a preponderance of the evidence.

But if in your minds the evidence is equal on any issue, the one having the burden of proof will fail, because he must have evidence in support of his claim that carries something more than evidence to the contrary, however slight it may be, before he can prove that issue.

Now, ladies and gentlemen of the jury, with reference to the determinative issues I have just read to you, and with [fol. 1061] reference to the questions of fact which are also in the form of questions, and with reference to the word evidence contained in any one of the special charges, which have been read to you prior to argument, and which will go with you to the jury room, you must determine these determinative issues, and the answers to the questions of fact, not upon speculation, but, rather, upon the greater weight of the evidence as I have just defined it to you.

Third, you will not consider or determine whether or not defendant is liable. You will determine the amount in money of the damages to which plaintiff would be entitled if the Court determines from your special verdict that the plaintiff may recover.

The fact that you determine an amount does not mean that you are awarding damages to the plaintiff, because whether damages are awarded depends upon the conclusions at law the Court draws from your determination of the issues.

The rule of law by which you will determine the amount is as follows:

You may and should consider the nature, extent and character of the injury suffered. You should also consider the pain and suffering the plaintiff has undergone, and [fol. 1062] such pain as you find he is reasonably certain to undergo in the future.

You should also consider any medical care that he has been put to. You should consider any permanent physical injury or permanent physical defect of any kind which you find he has received as a direct and proximate result of the injuries received.

You have a right, also, to consider mental anguish, suffering and pain that he has gone through or with reasonable certainty that he will continue in the future.

You should consider the reasonable value of any loss of wages which the plaintiff may have sustained to present, if any, and such future loss of wages if any you find with reasonable certainty plaintiff will sustain in the future; which sum, however, shall be reduced by you to its present value, but in no event may these damages exceed the amount of the plaintiff's prayer, $750,000.

The law requires that the jury make a separate finding on each of the determinative issues in this cause. The Court has prepared the questions on separate pieces of paper. Therefore, you may separately report on each question.

Thus, whenever at least nine or more of your members [fol. 1063] agree on an answer to any one of the questions, those of you who so agree will sign the answer to the question. The foreman, whether he agrees to the answer or not, will insert the answer

If there is a question the answer to which nine jurors cannot agree, you may temporarily pass such question, and proceed to answer the remaining questions. Later return and again consider any question you have passed.

If after a reasonable length of time nine jurors are finally unable to agree upon the answer to any question, you will answer such question by writing, "The jury cannot agree."

Do not let the foregoing become confusing to you. When nine jurors or more agree, then the question should be answered and signed. Therefore, some questions may be answered by only nine jurors. Some questions may be answered by all twelve jurors; and some questions may be answered "The jury cannot agree."

If during the trial the Court said or did something which you consider an indication of the opinion of the Court on any of the facts or determinative issues in dispute, you are instructed to completely disregard it.

In addition, you are reminded that the evidence comes [fol. 1064] from the lips of the witnesses on the stand, together with the exhibits that have been introduced in evidence, and any stipulations that have been entered into the record in this case as agreed to by counsel on both sides, and you will disregard any information that has come to your eyes and ears from outside this court room, especially any accounts of this case that may have appeared in the newspapers, or on and over the radio and television.

At the opening of the trial counsel for the plaintiff and counsel for the defendant gave to the jury opening statements for the purpose of outlining what they believed the evidence would disclose as the trial progressed.

Then when the presentation of the testimony was completed, their closing arguments summed up the evidence from the standpoint of each side, respectively, with a view to helping the jury reach a fair and proper conclusion. The Court instructs you that such statements and arguments are not evidence and not to be considered by the jury as such.

You were permitted to view the premises where the alleged incident occurred. You are instructed that what you saw on this view was not evidence and must not be [fol. 1065] so considered by you.

The view was taken with the purpose of giving you a sense of relation such as would enable you to better understand and apply the evidence as you heard it detailed.

This charge is not given for the purpose of having the Court participate in your deliberation, but for an entirely different purpose of explaining that part of the law which

you are to apply in determining the facts in dispute, and giving answers to the determinative issues in this cause.

The Court suggests that when you go to your jury room that you first consider the exhibits, the pleadings, and the special verdict submitted. Examine and read them over carefully. Take each individual question up in the order in which it comes, and arrive at a conclusion upon each and every question.

Then go on and answer each of the questions of fact, which are headed Interrogatories, and, as a matter of fact, there will only be one such question that you will have in your jury room, and that question reads as follows: It is titled 5-A. "Where on plaintiff's body was his first skin infection?"

You should confer with each other in your deliberations [fol. 1066] and give careful consideration to the views expressed by each juror.

Until your verdict is announced and accepted by the Court, you are not to disclose to anyone other than the members of the jury the status of your deliberations.

The Court will place in your possession the pleadings, the exhibits, the special instructions on the law, the special verdicts, and the questions of fact submitted. The foreman will retain possession of the records, including the verdict and return them to the court room.

You will retire to the room which is available for your deliberations. Select a foreman who can be either a man or a woman, and whenever nine or more of your number agree upon and sign all the special verdict forms, and the special findings required to be answered, you will make that fact known by rapping on the door and you will be returned to the court room.

Any question which you wish to pose to the Court must be reduced to writing and given to the bailiff.

Is there anything additional from counsel?

COLLOQUY RE: CHARGE OF THE COURT

(Thereupon the following proceedings occurred at the bench, outside the hearing of the jury:)

Mr. Leasure: On behalf of the defendant, we do not [fol. 1067] have any request for an additional charge.

However, I want to save my exceptions and enter objection to the charge that has been presented and the special verdict that has been submitted. I assume we can do that after the jury retires.

The Court: You will do that, when I completely finish you do it then.

Mr. Dudnik: Do you think that the Court ought to charge that the defendant has to prove its affirmative defense by a preponderance of the evidence?

Mr. Leasure: I thought that was covered, your Honor, either party.

Mr. Dudnik: Fine, if it is covered it is covered.

The Court: To be frank I don't remember, but I think I made it clear to the jury.

Mr. Dudnik: I won't press it, your Honor. I won't press it. Now, did you tell the jury—I think you said the same nine do not have to sign each. You said any nine.

The Court: Did I use the word same?

Mr. Dudnik: No, you did not. Now, Judge, you gave [fol. 1068] as a special charge: "If you find from the evidence that defendant is negligent, and such negligence was a proximate cause of damages to the plaintiff, then defendant is liable for all consequences proximately resulting from such negligence, even if you find from the evidence that defendant neither foresaw nor should have foreseen the extent or nature of such damage."

You gave the charge to the jury that is inconsistent with your interrogatory.

The Court: It is inconsistent?

Mr. Dudnik: With 22—I believe—with the special interrogatory.

Mr. Leasure: Note in the record that the defendant is objecting to any further charge on the subject, in the manner or form requested by the plaintiff.

Mr. Dudnik: "If the answer to the former question is yes, was it within the realm of reasonable probability or foreseeability of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?"

Now read that. I am just putting it up to the Court. [fol. 1069] I won't argue it.

The Court: I don't think they are inconsistent.

Mr. Dudnik: You don't think they are inconsistent. You could say with some harm to plaintiff, but here you say they don't have to foresee the end result, and here you say they have to foresee the end result.

The Court: I don't think it is inconsistent.

Mr. Dudnik: You do not?

The Court: No.

(Thereupon, the proceedings were resumed in the presence and hearing of the jury as follows:)

The Court: Since the first twelve members of the jury panel have been able to attend and are now ready to deliberate, it will not be necessary to call upon the 13th and 14th jurors for further service. Had any of the first twelve been incapacitated you would have taken his or her place. The Court thanks you for the civic duty you have rendered and permits you to step aside and be excused at this time. You may return to the jury room. I will ask you to refrain from expressing any opinion or discussing the case until the jury returns its verdict. Do you understand that? [fol. 1070] Do you understand? Thank you very much.

Ladies and gentlemen of the jury: You will now retire to the jury room. The bailiff will take along with you the pleadings, the interrogatory, the special instructions, and the special verdict.

Your first order of business, as I have instructed you, will be to elect a foreman and then begin your deliberations. Good luck to you. You may retire to the jury room.

(Thereupon the jury retired to consider the verdict.)

Mr. Leasure: At this time the defendant objects to the form and content of the special verdict, and also objects for the reason that it does not cover all necessary points of the case, and further objects for the reason that it includes some questions which are mixed questions of law and fact.

Further object to the Court reading from the pleadings and sending the pleadings to the jury, inasmuch as they cover and include questions other than factual questions, including mixed questions of law and fact, and some statements of law.

If I didn't say it before, we object to the form and content of the special verdict, and we take our exceptions to it, and a general exception to the charge of the Court.

[fol. 1071] Mr. Nurenberg: Show for the plaintiff a general exception to the form and content of the special verdict, special exception particularly show to question number 22, for the reason that it is not a determinative issue, the foreseeability of plaintiff's present bodily condition not being a determinative issue.

The Court: Let the record show that there is no objection on the part of counsel on both sides that the jury be instructed by the Court through its bailiff that they begin their deliberations tomorrow morning, without coming down, in the jury room, without coming to the court room.

Mr. Leasure: The exhibits then will be taken from the jury room up to their deliberation room?

The Court: From here, and that the exhibits will be delivered to the deliberating jury room, and the special instructions.

For the record, show that all these objections have been overruled.

[fol. 1072] Thursday morning session,
10:30 a.m., June 25, 1959

QUESTION SUBMITTED TO COURT BY JURY

(Thereupon the following proceedings were had in the Court's chambers:)

The Court: Let the record show that the jury has submitted a question to the Court, as follows:

"Is it a polic[illegible] of the B & O Railroad to have periodic examinations for their employees such as Mr. Gallick in his type of work? Purpose of question: To establish previous health record."

First, may I say, do I understand that counsel on both sides have agreed that it will not be necessary to call the jury down to give them the answer to this question?

Mr. Dudnik: I will agree to that.

Mr. Nurenberg: I agreed to that in your absence.

The Court: And the answer can be submitted to them through the bailiff in writing?

Mr. Dudnik: I agree to that.

Mr. Leasure: That is agreeable with the defendant.

The Court: Then, the answer that the Court is sub- [fol. 1073] mitting to the jurors at this time is as follows:

Dated June 25, 1959. "In answer to your question relating to periodic examinations of employees, this is a question of fact, and you will have to rely on your memory as well as the exhibits as to what facts were established by the evidence. Signed, Judge Victor Cohen."

Now for the record, did you want—

Mr. Leasure: Yes, your Honor, the defendant is objecting to the submission of that answer.

The Court: The objection will be overruled.

Mr. Leasure: And I would like the record to show that the defendant had submitted a proposed answer which we think is the one that should be given, which is as follows:

"Your question with regard to periodic examinations for B & O employees relates to a subject on which there is no evidence in the record. You are instructed to rely upon your own recollection of the evidence which was introduced in the case in your deliberations."

Mr. Nurenberg: Let the record show that the plaintiff [fol. 1074] objected to the proposed answer submitted by the defendant for the reason that it would involve the Court on commenting upon the evidence.

The Court: For the purpose of the record, too, gentlemen —don't leave—only in the interest of making it as comfortable and convenient as is possible for the jurors, I would like to have an understanding between counsel as to those times when the jury will be permitted to go to lunch, and if the jury should deliberate beyond today, and speaking of the time of adjournment for today, that it may not be necessary for counsel on either side to be present at the time the jury is sent to lunch and told to adjourn for the day.

Is there any objection to that? But, however the Court will notify both sides in sufficient time so they can be present if they so desire.

Mr. Nurenberg: May I ask a question, Judge? Would you then send them directly from the jury room to lunch, and then for the day, or bring them down here first?

The Court: I shall bring them down both at lunch time and at adjournment time.

Mr. Dudnik: I have news for you, your Honor. You will [fol. 1075] not have to call me. I will be here sweating out my baby.

The Court: We will call counsel anyway. But if for any reason counsel isn't here, do I understand that counsel has no objection that the Court send the jury on to lunch?

Mr. Leasure: We have no objection, your Honor.

The Court: And home at the end of the day?

Mr. Hadden: Can we have an indication as to what the times will probably be?

The Court: Well, probably 12:00, and about 4:30.

Mr. Dudnik: May I suggest this—and this is just throwing it out—that the bailiff tell the jury they can go to lunch when they want to, or not say anything about it.

The Court: That sounds like a convenient time, 12:00.

Mr. Leasure: I don't see why there should be any objection. It helps us to know when to be here or close by.

The Court: Well, let's say 12:00, and 4:30. But we will call you anyway.

[fol. 1076] Mr. Leasure: Fine.

4:25 p.m., Friday, June 26, 1959

(Thereupon the jury, after due consideration and deliberation, was returned to the court room and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, have you selected a foreman?

Juror No. 7: We have.

The Court: Who is the foreman?

Juror No. 7: I am.

The Court: Has the jury answered the questions that have been presented to them by the Court?

Juror No. 7: Yes, your Honor, with the exception of one question, your Honor.

The Court: Will you turn the questions and answers over to the bailiff, please.

At this time I would like to see counsel in my chambers, and may I say to the ladies and gentlemen of the jury, until such time as you are discharged will you please be seated, make yourselves as comfortable as you can. Do not talk about this case amongst yourselves, and certainly [fol. 1077] not to anybody in this room.

(Thereupon the following proceedings occurred in the Court's chambers:)

The Court: Question No. 1: Did a pool of stagnant water exist under the Columbus Road bridge during the entire early part of August, 1954?

The answer is yes.

Mr. Leasure: By all twelve?

The Court: By all twelve. Question No. 2: Was the pool of stagnant water on the premises of the defendant B & O?

Answer, yes. Twelve.

If the answer to 2 is yes, was the defendant B & O in possession of the premises under the Columbus Road bridge whereon the stagnant water stood?

The answer is yes. Signed by twelve.

Did the defendant B & O have under its control the premises under the Columbus Road bridge wherein the stagnant water stood?

Yes. Signed by twelve.

If the answer to Question No. 2 is yes, did dead pigeons accumulate under the bridge in the stagnant water?

The answer is yes. Signed by ten.

[fol. 1078] If the answer to No. 2 is yes, did dead rats accumulate under the bridge in the stagnant water?

The answer is yes. Signed by nine.

Question No. 7: If the answer to No. 2 is yes, did vermin accumulate under the bridge in the stagnant water?

The answer is yes. Signed by twelve.

If the answer to No. 2 is yes, did bugs accumulate under the bridge in the stagnant water?

The answer is yes. Signed by twelve.

Question No. 9: Was the plaintiff required to perform his work duties in close proximity to the area referred to in question No. 1?

Answer is yes. Signed by twelve.

Question No. 10: On approximately August 10, 1954, was plaintiff bitten by an insect?

Answer, yes. Signed by twelve.

No. 11: If the answer to Question No. 10 is yes, was he bitten while performing his usual and customary work duties?

Answer, yes. Signed by twelve.

If the answer to No. 10 is yes, was he bitten near or about the Columbus Road bridge?

Answer, yes. Signed by twelve.

[fol. 1079] Question No. 13: Did the defendant B & O provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?

Jury can't decide on this question. No signatures.

Question No. 14: If the answer to Question 1 is yes, did the defendant B & O know that by permitting this accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs, and vermin would be attracted to said area?

Answer, yes. Signed by ten.

Question No. 15: If the answer to 14 is yes, did the defendant B & O know that its employees would have to work in this area?

Answer, yes. Signed by ten.

Question No. 16: Was the defendant negligent in one or more of the particulars alleged in the petition?

Answer, yes. Signed by twelve.

Question No. 17: If the answer to Question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence.

And I will give you a little time to write this out. This [fol. 1080] is the answer: "There existed a pool of stagnant water on premises in the possession of and under the control of defendant, into which was accumulated dead pigeons, rats, and various forms of bugs and vermin."

Signed by ten.

Mr. Leasure: That was 17?

The Court: Right. Question No. 18: Was the illness or disease from which Mr. Gallick now suffers caused in whole or in part by an insect bite sustained by him on Defendant B & O's premises?

Answer, yes. Signed by twelve.

Question No. 19: Were the injuries to the plaintiff proximately caused in any part, even the slightest, by any one or more of the acts or omissions of the defendant?

Answer, yes. Signed by twelve.

Question number 20: If the answers to any one of the questions numbered 1, 5, 6, 7 and 8 is yes, was there any reason for the defendant B & O to anticipate that such would or might probably result in a mishap or an injury?

Answer, no.

Mr. Leasure: Signed by how many?

The Court: Signed by ten.

Question No. 21: Is there a proximate causal relation-[fol. 1081] ship to the stagnant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff?

Answer, yes. Signed by twelve.

Question No. 22: If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?

Answer, no. Signed by twelve.

Question No. 23: What amount of money will compensate the plaintiff, James J. Gallick, for his injuries and damages, if any, resulting proximately from this accident?

Answer, $625,000. Signed by twelve.

Interrogatory 5-a: "Where on plaintiff's body was his first skin infection?"

Answer: Back of left leg approximately four inches above the knee, more to the outside. Signed by twelve.

Now, gentlemen, upon a review of these answers, do you believe that there are any answers to determinative issues that have been neglected and are now unanswered, other [fol. 1082] than the one that the jury returned unanswered?

Mr. Dudnik: No, sir.

Mr. Nurenberg: No, sir.

Mr. Leasure: I am not sure that I get the exact contents of the Court's question. As I understand it, the Court submitted a special verdict of 23 questions which the Court prepared?

The Court: That's right.

Mr. Leasure: And I don't know how the jury could answer any more questions than they did, with the exception of the one question they did not answer.

The Court: This is merely a formal question—

Mr. Dudnik: I think that is a verdict, your Honor. They have reached a verdict.

Mr. Leasure: We are not waiving our objection as we entered in the record at the time the special verdict was submitted We thought then and we still think it is an incomplete special verdict since it does not cover all dispositive issues. There is no use in repeating all that.

The Court: As far as you are concerned, you may have [fol. 1083] your objections. The Court has ruled on those.

Gentlemen, will you excuse us. I would like to ask one favor of you, that all the lawyers go out through this door and stay in the hall.

(Thereupon proceedings were resumed in the presence of the jury, as follows:)

The Court: Ladies and gentlemen of the jury, in view of the fact that the Court still has legal problems to con-

sider, and until such problems are resolved, the services of the jury will still be required.

The Court has made arrangements to take all of you to dinner. You will be in the custody of the bailiff.

You will return here to the jury box in the court room at 8:00, once more, with the admonition that you do not talk about this case to anyone, not even amongst yourselves during this period.

You are excused temporarily until the bailiff is prepared to take you to dinner. You will go with him.

(Thereupon the jury was excused, and the following proceedings were had in the absence of the jury:)

Mr. Leasure: I am not sure that I made our position [fol. 1084] clear in chambers and I want to do it now.

It is the defendant's position that the jury has answered all factual questions which were put to them. They had completed their duty, and the special verdict should be accepted as is.

Mr. Dudnik: I am of the same opinion, your Honor, that the special verdict should be accepted as is.

The Court: Well, the Court wants to think it over before it gives its answer.

[fol. 1085] 8:20 p.m., Friday, June 26, 1959

(Thereupon the jury was returned to the court room, and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, the Court is very appreciative of the time and effort that has gone into this case on the part of the jurors in this case. I think I sincerely recognize, as you do, that this has been an important case, a well-fought case, and the time has come for the Court's decision in this case.

I think in our voir dire that I made some mention of the fact that I knew of no service that any citizen of our community can render to our community or to our country that is more important than the service of acting as a

juror in either a civil or criminal case, unless it be the military.

You have been serious, you have been patient, and you have contributed much to this community by offering your services as jurors in this case and other cases that you may have sat in.

I think that as a result of this service that you will feel that you are better citizens for having served as jurors for the County of Cuyahoga. I want to thank you completely [fol. 1086] for your efforts in this case.

Your duties in this case are now completed, and you are discharged. You may remain if you desire while the Court renders judgment upon the finding that the jury has answered the determinative issues as follows, and I shall read them:

"We the jury being first duly empaneled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause."

1. Did a pool of stagnant water exist under the Columbus Road bridge during the entire early part of August, 1954?

The answer was yes, and this was signed by all twelve jurors.

2. Was the pool of stagnant water on the premises of the defendant B & O?

Yes, and signed by all twelve jurors.

3. If the answer to 2 is yes, was the defendant B & O in possession of the premises under the Columbus Road bridge whereon the stagnant water stood?

The answer was yes, and signed by all twelve jurors.

[fol. 1087] 4. Did the defendant B & O have under its control the premises under the Columbus Road bridge wherein the stagnant water stood?

The answer was yes, and signed by all twelve jurors.

5. If the answer to Question No. 2 is yes, did dead pigeons accumulate under the bridge in the stagnant water?

Yes, and signed by ten jurors.

6. If the answer to No. 2 is yes, did dead rats accumulate under the bridge in the stagnant water?

The answer is yes, and signed by nine jurors.

7. If the answer to No. 2 is yes, did vermin accumulate under the bridge in the stagnant water?

The answer is yes, and signed by twelve jurors.

8. If the answer to No. 2 is yes, did bugs accumulate under the bridge in the stagnant water?

The answer is yes. Signed by twelve jurors.

9. Was plaintiff required to perform his work duties in close proximity to the area referred to in Question No. 1?

Answer, yes, and signed by twelve jurors.

[fol. 1088] 10. On approximately August 10, 1954, was plaintiff bitten by an insect?

Answer, yes. Signed by twelve jurors.

11. If the answer to Question No. 10 is yes, was he bitten while performing his usual and customary work duties?

Answer, yes. Signed by twelve jurors.

12. If the answer to No. 10 is yes, was he bitten near or about the Columbus Road bridge?

Answer, yes. Signed by twelve jurors.

13. Did the defendant B & O provide the plaintiff Mr. Gallick a reasonably safe place to work under the facts and circumstances existing at the time?

Jury can't decide on this question.

14. If the answer to Question 1 is yes, did the defendant B & O know that by permitting the accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs, and vermin would be attracted to said area?

Answer, yes. Signed by ten jurors.

15. If the answer to 14 is yes, did the defendant B & O know that its employees would have to work in this area?

Answer, yes. Signed by ten jurors.

16. Was the defendant negligent in one or more of the particulars alleged in the petition?

[fol. 1089] Answer, yes. Signed by twelve jurors.

17. If the answer to Question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence.

Answer: There existed a pool of stagnant water on the premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats, and various forms of bugs and vermin.

Signed by ten jurors.

18. Was the illness or diseases from which Mr. Gallick now suffers caused in whole or in part by an insect bite sustained by him on defendant B & O's premises?

Answer, yes. Signed by twelve jurors.

19. Were the injuries to the plaintiff proximately caused in any part, even the slightest, by any one or more of the acts or omissions of the defendant?

Answer, yes. Signed by twelve jurors.

20. If the answers to any of the questions numbered 1, 5, 6, 7, and 8 is yes, was there any reason for the defendant B & O to anticipate that such would or might probably result in a mishap or an injury?

Answer, no. Signed by ten jurors.

21. Is there a proximate causal relationship to the stag-
[fol. 1090] nant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff?

Answer, yes. Signed by twelve jurors.

22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?

Answer, no. Signed by twelve jurors.

23. What amount of money will compensate the plaintiff James J. Gallick for his injuries and damages, if any, resulting proximately from this accident?

Answer, $625,000. Signed by twelve jurors.

There was one interrogatory submitted to the jury which reads as follows: 5-a. Where on plaintiff's body was his first skin infection?

Answer: Back of left leg approximately four inches above the knee, more to the outside. Signed by twelve jurors.

Mr. Leasure: If your Honor please, may we have the jury polled on the answer to No. 23?

(Thereupon the jury was polled on the answer to No. 23.)

[fol. 1091] JUDGMENT FOR PLAINTIFF

The Court: The Court now enters judgment for the plaintiff in the amount of $625,000, and orders the plaintiff to prepare a Journal Entry as required in this cause.

Mr. Leasure: If your Honor please, we would like to have an opportunity to file a motion for judgment notwithstanding. Will we have the opportunity to do that? In other words, I want to preserve our rights to ask for judgment notwithstanding, and also to ask for judgment on the basis of the special verdict to which I think we are entitled to on the basis of the answers.

Mr. Dudnik: The Court entered judgment and you can go from there.

Mr. Leasure: I want to make sure now that I am making my position clear.

The Court: I recognize what Mr. Leasure has reference to.

Mr. Leasure: I wasn't aware that the Court was going to enter judgment right at this time before I could make my motion.

Mr. Dudnik: You can still file your motion.

[fol. 1092] The Court: I think Mr. Leasure wants to preserve the record, and the Court will entertain those motions.

As a matter of fact, the Court will withdraw the statement entering judgment at this time, permitting counsel for the defendant to make his motion.

Mr. Dudnik: I must enter an objection.

(Thereupon the following proceedings occurred at the Court's bench outside the hearing of the jury:)

Mr. Leasure: We have two things here. I don't know which is first or second, I think they both come at or about the same time.

But we have two things, one being that we are entitled to judgment notwithstanding the findings of the jury here. We are entitled to that as a matter of law on the basis of the record.

Secondly, we are entitled to judgment on the basis of the answers contained in the special verdict, and I want an opportunity to make both motions before any judgment is entered, your Honor.

Mr. Dudnik: If your Honor please, your Honor has a right to enter judgment—

Mr. Leasure: I want a chance to argue them and have them presented properly and formally, so that appropriate [fol. 1093] action can be taken after that.

Mr. Nurenberg: If I may be briefly heard, your Honor, I would think that by entering judgment O.S.J., Mr. Leasure's rights are fully protected, because up until the Journal Entry is signed he has ample opportunity to make any motions he wants to, and certainly arrangements can be made to withhold the signing of the journal entry which will formalize the judgment until he has made his appropriate motions, but the duty of the Court is to enter judgment.

The Court: Will you go along with that?

Mr. Leasure: No, your Honor. Why enter a judgment unless you mean to enter a judgment, and you can't—

Mr. Dudnik: Wait a minute. His Honor meant to enter a judgment.

Mr. Leasure: You can't make final decision until I have had a chance to make my motions and be heard.

The Court: Just a minute. We want to preserve this record so as to make certain everything is done in its proper order.

Mr. Dudnik: If I may be heard, your Honor.

[fol. 1094] The Court: Yes.

Mr. Dudnik: The defendant may be entitled to a judgment N.O.V., that means notwithstanding your judgment.

The defendant may be entitled to a verdict, for a new trial. The defendant may be entitled to—well, those are the two premises.

The Court: He hasn't mentioned anything about a motion for a new trial.

Mr. Leasure: I have ten days in which to file a motion for a new trial. That is a matter of statute. I am not mentioning that at this time.

Mr. Dudnik: But those will be heard and considered after the Court's judgment. The defendant's rights are not prejudiced by the Court entering a judgment. He can have his N.O.V. He can have his new trial.

The Court: Well, let me—

Mr. Leasure: I can't have a judgment on the special verdict unless I have a chance to be heard and argue it and then the Court decide it. That is all I am asking.

The Court: Let me get this straight now. The two motions that you have made—

Mr. Leasure: I want an opportunity to make them, your [fol. 1095] Honor. I am not making them formally at this time. But I am telling the Court that I expect to—

The Court: Well—

Mr. Leasure: And I would like a chance to present them formally and be heard on them. These are serious matters.

The Court: The two things that you have in mind; however, is a motion for judgment notwithstanding the order of the Court?

Mr. Leasure: No. We have a special verdict here. Now, what it means is a matter of opinion. But so far we just have a verdict in the form of a special verdict.

Now, I want a chance to make a motion for judgment notwithstanding the verdict. I also want a chance to make a motion for judgment on the verdict, and I think they should be presented and considered at the same time, perhaps the motion for judgment on the verdict should be presented first and argued first.

But I would like to do it at my own time. I am not going to choose the order at my peril.

Mr. Dudnik: But, your Honor, until your judgment is [fol. 1096] journalized those matters are open to the defendant. Your Honor can't enter a judgment O.S.J.

The Court: I want a few minutes to take under advisement the request—

Mr. Dudnik: Will your Honor send the jury home?

The Court: No. Let them stay here. I may want to talk to them.

Mr. Nurenberg: May I have a brief word?

The Court: Yes.

Mr. Nurenberg: I think this is exactly analogous to what a Court of Appeals does when it renders a judgment O.S.J. Nobody's rights are prejudiced in that event, and nobody's appeal to the Supreme Court can be taken until the prevailing side presents its Journal Entry.

The Court of Appeals renders its judgment, but it is rendered O.S.J., and none of the statutory time expires until the O.S.J. has been signed.

Mr. Leasure: I am not talking about statutory time, your Honor, at all.

The Court: I think I know what counsel for the defendant [fol. 1097] has asked. He has asked to be heard. He wants to make a formal motion for judgment notwithstanding the verdict, and a motion for judgment on the verdict.

Mr. Leasure: And the Court took me by surprise by entering judgment on this verdict without giving me a chance to make any motion or be heard on it.

Mr. Nurenberg: O.S.J.

The Court: The Court certainly didn't intend to take counsel by surprise.

Mr. Leasure: I want to keep my position clear.

The Court: And I do want to take under advisement, and I will try to have an answer for you in just a few minutes.

Mr. Dudnik: In other words, your Honor, what I say is your Honor may enter a judgment, but until it is journalized they have all their rights preserved.

The Court: I have heard you. I am making a decision.

Mr. Leasure: You can't enter a judgment, so why do it if you are not doing it?

[fol. 1098] The Court: The Court has considered the request by Mr. Leasure, counsel for the defense, and it is the Court's opinion that in rendering judgment as the Court did, it was done properly.

The Court has ordered counsel for plaintiff to prepare Journal Entries, one which will cover the special verdict, and one which will cover the finding of the Court, and the Court assures counsel for the defense that it will have every opportunity to file the motions that counsel for defense has referred to, and the proper hearing will be granted, providing of course the motions are filed within reasonable times.

Mr. Leasure: How long do we have, your Honor, to file this motion?

The Court: A week, ten days, sufficient time.

Mr. Leasure: There is one thing I don't understand. How can I file a motion for judgment on the special verdict when you have already rendered judgment on the special verdict?

That is, I would ask for judgment in favor of the defendant on the special verdict, and you have already rendered judgment for the plaintiff.

The Court: Because it has not been journalized, and [fol. 1099] until such time as it is journalized it is not officially an order of the Court.

Mr. Dudnik: That's right.

Mr. Leasure: Do I understand that the Court is passing judgment on the special verdict without giving me an opportunity to be heard on it?

Mr. Dudnik: You will be heard.

Mr. Leasure: On a motion for judgment.

The Court: You will be heard. If the Court is convinced otherwise, from what it has already done, of course, the Court may change its mind.

Mr. Leasure: Well, give me ten days to file a motion for judgment on the special verdict. I will file it in writing.

The Court: There is only one problem as I see it. The term of Court will be over on the 22nd of July. You want time to file your motion for a new trial, too. I am satisfied that you have ten days, Mr. Leasure, and I don't want to deprive you of that, but I would appreciate—

Mr. Leasure: Don't I have ten days after the judgment is formally entered on my motion for a new trial?

The Court: I think that is right, yes.

[fol. 1100] Mr. Nurenberg: After the Journal is signed.

Mr. Leasure: I wasn't mentioning that at this time.

The Court: I am saying to you now you have ten days to file these motions. If you can get them in sooner, the Court would appreciate it, that's all.

Mr. Leasure: In other words, I have ten days in which to file a motion for judgment on the special verdict?

The Court: Right.

Mr. Leasure: And I also have ten days in which to file a motion for judgment notwithstanding the verdict?

The Court: Right.

Mr. Leasure: All right.

[fol. 1101] And thereafter, to-wit, on the ..... day of ....., A.D. 1959, being within the time fixed and allowed by law, the defendant filed its motion for judgment on the special verdict, for the reasons and upon the grounds stated and set forth in said motion; which motion is a part of the record herein.

And thereafter, to-wit, on the ..... day of ...., at the same term of Court, the said defendant's motion for judgment on the special verdict was overruled by the Court, to which ruling of the Court counsel for the defendant then and there duly excepted.

And thereafter, to-wit, on the ..... day of ...., A.D. 1959, being within the time fixed and allowed by law, the defendant filed its motion for judgment notwithstanding the verdict, and its motion for a new trial, for the reasons and upon the grounds stated and set forth in said motions, which motions are a part of the record herein.

And thereafter, to-wit, on the ..... day of ...., at the same term of Court, the said defendant's motion for judgment notwithstanding the verdict, and motion for a new trial, were overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted.

[fol. 1102] And thereafter, to-wit, on the ..... day of ....., A.D. 1959, pursuant to said special verdict of the jury, and finding of the Court, the Court entered judgment in favor of the plaintiff and against defendant, as appears of record in this case, to all of which counsel for defendant then and there duly excepted.

And thereafter, to-wit, on the ..... day of ...., A.D. 1959, being within the time fixed and allowed by law, the defendant filed its written notice of its intention to appeal. Praecipe for transcript of docket and journal entries filed by the defendant.

And thereafter, to-wit, on the 27th day of Nov., A.D. 1959, being within the time fixed and allowed by law, the said defendant filed with the Clerk of this Court, this, its Bill of Exceptions, and prayed that the same might be allowed and signed by the Trial Judge, and filed as and made a part of the record in this cause, but not spread at large upon the journal.

Receipt of said Bill of Exceptions is hereby acknowledged this 27th day of Nov. A.D. 1959.

Emil J. Masgay, Clerk of Courts, By David Kikstadt, Deputy Clerk.

[fol. 1103] JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

And thereafter, to-wit, on the ..... day of ...., A.D. 1959, notice of the filing of this Bill of Exceptions was duly served upon A. H. Dudnik, attorney for the plaintiff, the plaintiff being the adverse party herein, by the Clerk of this Court.

And thereafter, to-wit, on the ..... day of ...., A.D. 1959, being not less than ten days after the notice of the filing of this Bill of Exceptions, and within five days after the expiration of such ten days, to-wit, ... days after the service of such notice, this Bill of Exceptions, together with all exceptions and amend-

ments filed thereto, was duly transmitted by the Clerk of this Court to said Trial Judge.

Receipt of said Bill of Exceptions and all objections and amendments filed thereto, is hereby acknowledged this 11th day of Dec. A.D. 1959.

Victor Cohen, Trial Judge.

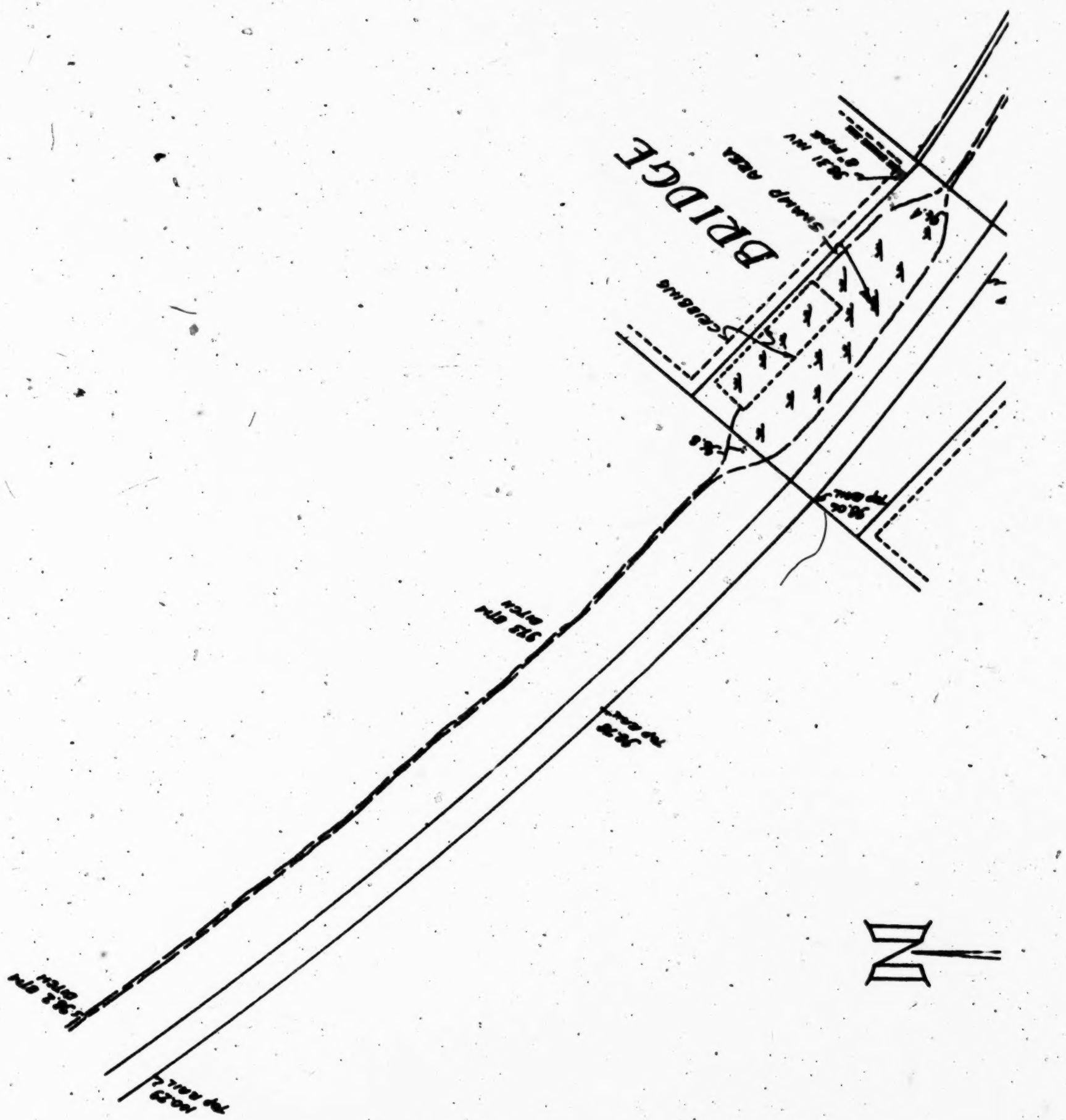
And thereafter, to-wit, on the 11th day of Dec., A.D. 1959, being within five days after the receipt of said Bill of Exceptions, together with all objections and amendments filed thereto from said Clerk, and within the time [fol. 1104] fixed and allowed by law, and upon due consideration of the same, this Bill of Exceptions is hereby allowed and signed by the Court, and it is ordered that the same be transmitted forthwith to the office of the Clerk of this Court, and that the same be filed as, and made a part of, the record in this cause, but not spread at large upon the Journal.

Victor Cohen, Trial Judge.

[fol. 1105a]

PLAINTIFF'S EXHIBIT 12

(See opposite) ☞


BRIDGE
Swamp area
Scaffolding
Old Mill Pond
Mill Pond
Old Mill Pond
Mill Pond
Old Mill Pond
Mill Pond
N

PLAINTIFF'S EXHIBIT 12

SURVEY OF AREA

UNDER & AROUND THE COLUMBUS ROAD BRIDGE

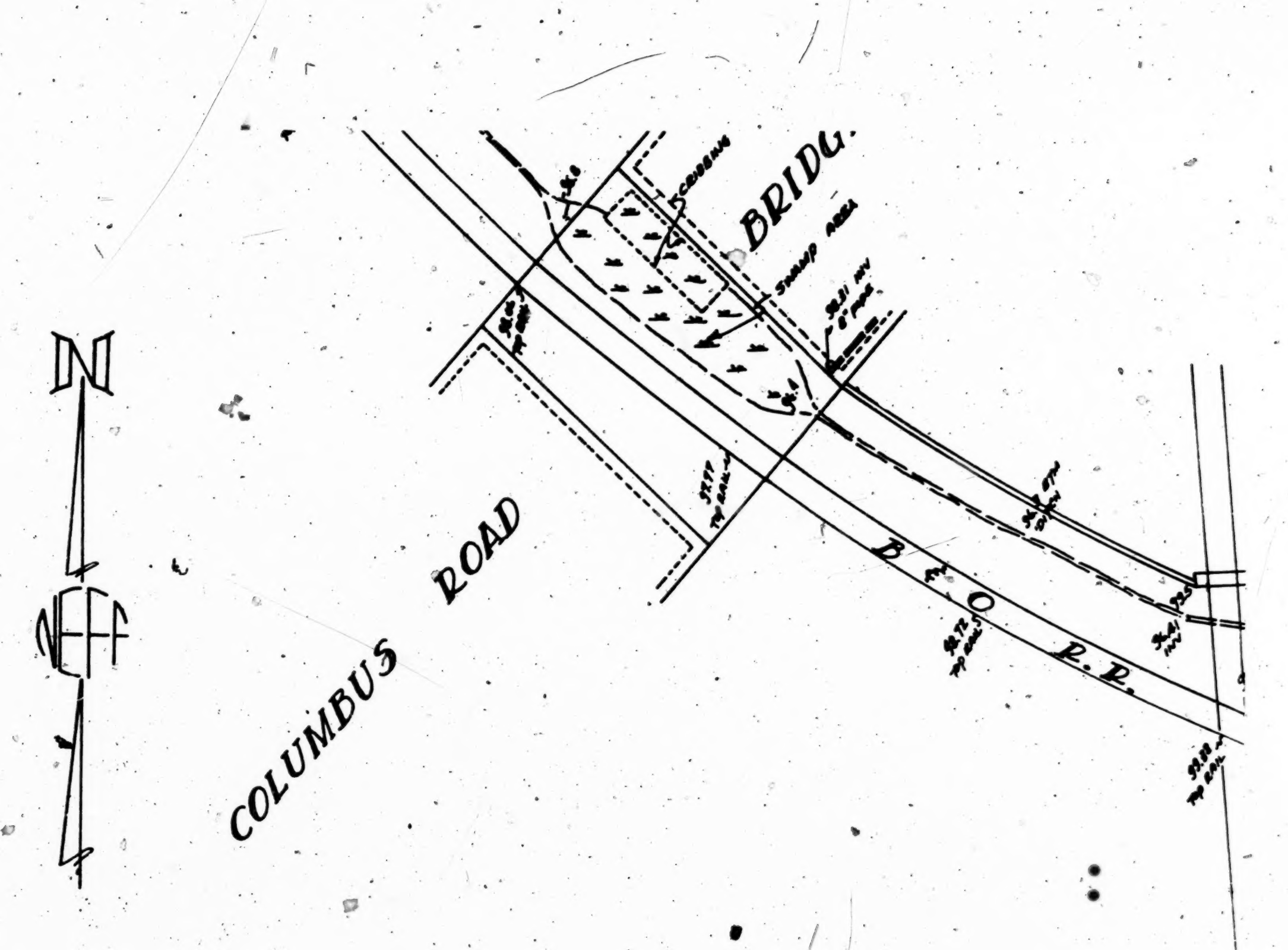
SCALE 1" = 20'

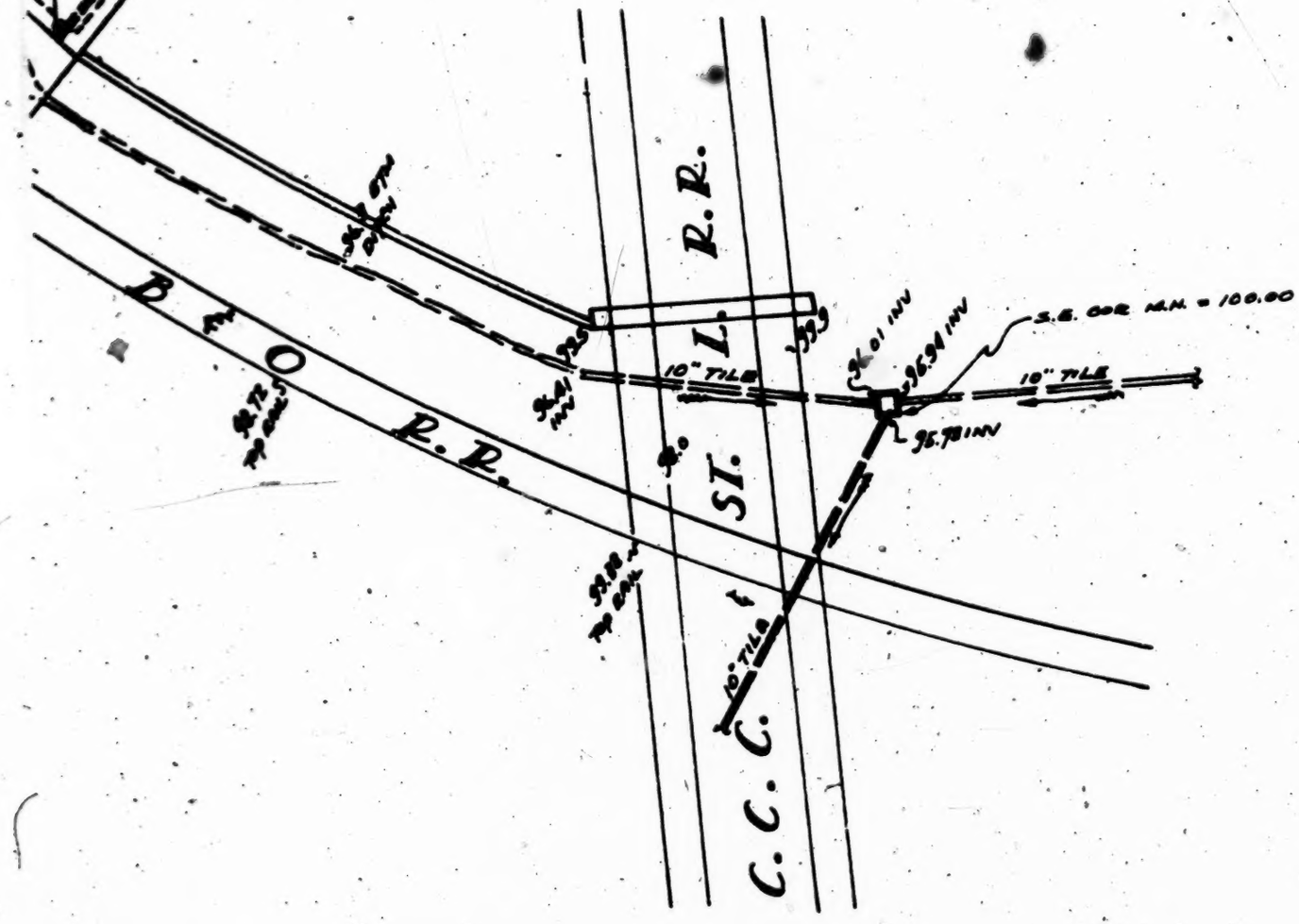
SURVEY JUNE 9, 1959

NEFF & ASSOCIATES

BY Carl W. Neff

REGISTERED SURVEYOR No 2544 OHIO
REGISTERED ENGINEER No 5905 OHIO


N
NEFF
COLUMBUS ROAD
BRIDG.
SCRUBBING
STAMP MILL
B & O R. R.


B & O
R. R.
R. R.
L.
ST.
C. C. C.
10" TILE
10" TILE
10" TILE
S.E. COR. M.H. = 100.00
96.94 INV
96.01 INV
95.78 INV

JOB. No 2793

[fol. 1105b]

PLAINTIFF'S EXHIBIT 13

(See opposite) ☞

No. 55143 / 5412722 ○ M ○ F

SUMMARY SHEET

MARYMOUNT HOSPITAL
GARFIELD HEIGHTS, OHIO

PATIENT'S LAST NAME: GALLICK | FIRST: JAMES | MAIDEN NAME:
ADMITTED: A.M. 1:30 | MO: September | DAY: 18 | YEAR: 1954

STREET: 4403 Dawshire | CITY: Parma | ZONE: | STATE: Ohio
BIRTHPLACE: Minn. | AGE: 53 | MO: July | DAY: 10 | YEAR: 1901

FLOOR: SP | ACCOMMODATIONS TYPE: 314-1 | RELIGION: Catholic | PARISH: St. Francis De Sales
DISCHARGED DATE: Dec. 8 1954 | HOUR: @ 11:00 AM

PHONE: S Tu 5-1066 | NATIONALITY: Bohemian | ATTENDING PHYSICIAN: Dr. Ippolito | RESIDENT OR INTERNE: DeCarlo

RACE	LAST PREVIOUS ADMISSION	MED	SURG	MAT	PED	PSYCH	T & A	OTHER
	Mayo		▼					

RESPONSIBLE PARTY: Mary | RELATIONSHIP: Wife | PATIENT ANOINTED | BY
ADDRESS: Same | CITY | TELEPHONE

SACRAMENTS RECEIVED | DATE

PROVISIONAL DIAGNOSIS

Ulcer Lt Popliteal Region
Possible malignancy

COMPLICATIONS

FINAL DIAGNOSIS

Pyoderma Granulosa Lt Leg
Popliteal Region (origin) & neck
thorax & legs

RESULTS Recovered ( ) Improved ( ) Unimproved ( ) Not Treated ( ) in for Diag only ( ) Died ( ) Autopsy ( )
Consultation C. L. Zipkin, M.D.

Infection on Admission ( ) in Hospital ( ) Not Infected ( )

OPERATIONS

1) multiple biopsies & excision of pyoderma Granulosa & Skin Graft

12-7-16 L

Wm Ippolito
ATTENDING PHYSICIAN

MC

APPROVED BY MEDICAL RECORD COMMITTEE PER

COMPLETE PERMANENT RELEASE SIDE

[fol. 1105b]

PLAINTIFF'S EXHIBIT 13

DATE September 18, 1954

AUTHORIZATION FOR
MEDICAL AND SURGICAL TREATMENT:

Upon the admission of James Gallick to MARYMOUNT HOSPITAL, I hereby give permission to the physician and the authorities of the above named hospital to administer any medical or surgical treatments (including anesthesia) deemed necessary and proper for the treatment of this patient. I hereby acknowledge that MARYMOUNT HOSPITAL is not responsible for any clothing, jewelry or other valuables retained by my while in the hospital.

WITNESS: Sister Mary Dulcina SIGNED James Gallick

WITNESS: RELATION TO PATIENT self

RELEASE FROM RESPONSIBILITY FOR ABORTION: DATE

I, the undersigned, a patient applying for admission to MARYMOUNT HOSPITAL, believe that I am in a condition of abortion. I hereby declare that neither the attending physician nor any person employed by or connected with the said hospital has knowingly performed any act which may have contributed to the induction of the abortion

WITNESSES: SIGNED

RELEASE FROM RESPONSIBILITY FOR DISCHARGE: DATE

This is to certify that I, a patient in MARYMOUNT HOSPITAL, am being discharged against the advice of the attending physician and of the hospital authorities. I acknowledge that I have been informed of the risk involved and hereby release the attending physician and the hospital from all responsibility for any ill effects which may result from such discharge.

WITNESSES: SIGNED

NOTE: *In case the patient is a minor, the above certificate must be signed by the parent or guardian who removes the patient from the hospital; otherwise it is signed by the patient*

PSYCHIATRIC TREATMENT:

This is to certify that I have been completely informed of the dangers as well as the possible benefits of Electric Shock and of Insulin Therapy and I hereby authorize Doctor and MARYMOUNT HOSPITAL to proceed with these treatments on (Patient's Name) as in their judgment seems best.

With full knowledge of the exigencies, dangers, and risks involved in consideration for the administrations of the treatments by MARYMOUNT HOSPITAL, its employees, officers and agents, we the undersigned hereby waive all claims which arise by reason of injury to the patient's person or loss of life resulting from the treatments. We do hereby assume full responsibility for the administration of the treatments and the results thereto. We agree to indemnify and hold harmless said MARYMOUNT HOSPITAL, its officers, employees or agents.

With full knowledge of the exigencies, we hereby waive any and all claims which might otherwise arise by reason of injury to the patient's person or property, or by reason of loss of property or life whether caused by the act of patient, other patients, officers or employees of MARYMOUNT HOSPITAL or otherwise, and expressly consent to total or partial restraint of patient and we hereby indemnify and agree to hold harmless MARYMOUNT HOSPITAL, its officers and employees from any claim or liability arising in any manner by reason of any such restraint, injury, loss or otherwise.

DATE SIGNED RELATION

WITNESSES SIGNED RELATION

I, bearing the relation of

to (Name of Patient) a deceased patient at MARYMOUNT HOSPITAL, do hereby grant the authorities of MARYMOUNT HOSPITAL to release the remains of the above patient to

(Undertaker's Name and Address) who is authorized to call for same at A.M. P.M.

(Date)

WITNESS SIGNATURE

MARYMOUNT HOSPITAL
Garfield Heights, Ohio

HISTORY AND PHYSICAL EXAMINATION

55143

Name Gedrick, James Age 53 Sex male Room 314-1 Hospital No. 541722

Physician Dr. Appleton Service Surgical Date 9/11

Chief complaint = ulcer on lt leg.

Present Illness - this 53 year of age white male is admitted with the C C of ulcer on lt thigh. Pt states that he was bitten by insect about 6-7 weeks ago with abscess formation which was open and drained by family physician. the ulcer small at the beginning & gradually began developing the last days prior to admission. Denies fever and pain.

Past history - Previous surgery = Tonsilectomy
Previous penicillin allergy - none
Pt has history of chronic anxiety
Habits = Smoke (-), Drinks (-)

Review of systems - G I = good appetite
regular BM
C-P = neg
Nervous = neg

— Physical —

~~W M~~ W N W D, ambulatory, WN in no distress

BP = 200/120, pulse 70, temp 98

1105D

Signature L. J. Marilla M. D.

[fol. 1105d]

History and Physical Examination Continued

Heart = negative

ENT = neg

Chest = Heart and lungs = negative findings.

abdomen = Soft, no tenderness no scars
nor masses

Extremities - Presence of 5 cm diameter ulcerated
area lower third, ~~left~~ anterior surface of Lt. thigh,
chronically infected with necrotic tissue
and moderate yellowish drainage.

~~Genitalia = neg~~

Impression = ulcer on Lt thigh,
chronically infected.

1105E

No. P 55143 ○ M X ○ F

SUMMARY SHEET

MARYMOUNT HOSPITAL B-1
GARFIELD HEIGHTS, OHIO

PATIENT'S LAST NAME	FIRST	MAIDEN NAME	ADMITTED A.M. P.M.	MO	DAY	YEAR
GALLICK	JAMES		4:00	January	4	1955

STREET	CITY	ZONE	STATE	BIRTHPLACE	AGE	MO	DAY	YEAR
4403 Dawshire	Parma		Ohio	Minn.	53	July	10	1901

FLOOR	ACCOMMODATIONS TYPE	ROOM	BED	RELIGION	PARISH	DISCHARGED DATE	HOUR
3E	W	301	4	Catholic	St. Francis De Sales	3-8-56	@ 11:30 A.M.

PHONE	NATIONALITY	ATTENDING PHYSICIAN	RESIDENT OR INTERNE
Tu.5-1066	Bohemian	Ippolito	Dr. Lee

RACE	LAST PREVIOUS ADMISSION	MED	SURG	MAT	PED	PSYCH	A A	OTHER	SACRAMENTS RECEIVED	DATE
W	9-18-54		X							

RESPONSIBLE PARTY	RELATIONSHIP	PATIENT ANOINTED	BY
Mary	Wife		

ADDRESS	CITY	TELEPHONE
Same as above		

PROVISIONAL DIAGNOSIS: Pyoderma - Gangrenosa - Secondary to Insect Bite

COMPLICATIONS:

FINAL DIAGNOSIS: Same.

381 - 10 .1 ✓
1 ✓
690 5 ✓

RESULTS: Recovered ( ) Improved ( ) Unimproved ( ) Not Treated ( ) in for Diag only ( ) Died ( ) Autopsy ( )
Consultations by: Drs. Bartunek, and Kozikowski

Infection: on Admission ( ) in Hospital ( ) Not Infected ( )

OPERATIONS: none

W Ippolito M.D.
ATTENDING PHYSICIAN

APPROVED BY MEDICAL RECORD COMMITTEE PER _____ M.D.

COMPLETE PERMIT ON REVERSE SIDE

[fol. 1105f]

PLAINTIFF'S EXHIBIT 14

DATE Jan 4, 1955

AUTHORIZATION FOR
MEDICAL AND SURGICAL TREATMENT

Upon the admission of James Gallick to MARYMOUNT HOSPITAL, I hereby give permission to the physician and the authorities of the above named hospital to administer any medical or surgical treatments (including anesthesia) deemed necessary and proper for the treatment of this patient. I hereby acknowledge that MARYMOUNT HOSPITAL is not responsible for any clothing, jewelry or other valuables retained by my _____ while in the hospital.

WITNESS M Sopher SIGNED Mary N. Gallick

WITNESS _____ RELATION TO PATIENT Wife

RELEASE FROM RESPONSIBILITY FOR ABORTION DATE _____

I, the undersigned, a patient applying for admission to MARYMOUNT HOSPITAL believe that I am in a condition of abortion. I hereby declare that neither the attending physician nor any person employed by or connected with the said hospital has knowingly performed any act which may have contributed to the induction of the abortion.

WITNESSES _____ SIGNED _____

RELEASE FROM RESPONSIBILITY FOR DISCHARGE DATE _____

This is to certify that I, _____, a patient in MARYMOUNT HOSPITAL, am being discharged against the advice of the attending physician and of the hospital authorities. I acknowledge that I have been informed of the risk involved and hereby release the attending physician and the hospital from all responsibility for any ill effects which may result from such discharge.

WITNESSES: _____ SIGNED _____

_____ NOTE: *In case the patient is a minor, the above certificate must be signed by the parent or guardian who removes the patient from the hospital; otherwise it is signed by the patient.*

PSYCHIATRIC TREATMENT:

This is to certify that I have been completely informed of the dangers as well as the possible benefits of Electric Shock and of Insulin Therapy and I hereby authorize Doctor _____ and MARYMOUNT HOSPITAL to proceed with these treatments on _____ (Patient's Name) as in their judgment seems best.

With full knowledge of the exigencies, dangers, and risks involved in consideration for the administrations of the treatments by MARYMOUNT HOSPITAL, its employees, officers and agents, we the undersigned hereby waive all claims which arise by reason of injury to the patient's person or loss of life resulting from the treatments. We do hereby assume full responsibility for the administration of the treatments and the results thereto. We agree to indemnify and hold harmless said MARYMOUNT HOSPITAL, its officers, employees or agents.

With full knowledge of the exigencies, we hereby waive any and all claims which might otherwise arise by reason of injury to the patient's person or property, or by reason of loss of property or life whether caused by the act of patient, other patients, officers or employees of MARYMOUNT HOSPITAL or otherwise, and expressly consent to total or partial restraint of patient and we hereby indemnify and agree to hold harmless MARYMOUNT HOSPITAL, its officers and employees from any claim or liability arising in any manner by reason of any such restraint, injury, loss or otherwise.

DATE _____ SIGNED _____ RELATION _____

WITNESSES _____ SIGNED _____ RELATION _____

_____

I, _____ bearing the relation of _____

to _____ (Name of Patient) a deceased patient at MARYMOUNT HOSPITAL, do hereby grant the authorities of MARYMOUNT HOSPITAL to release the remains of the above patient to

_____ (Undertaker's Name and Address), who is authorized to call for same at _____ A M _____ P M

_____ (Date)

WITNESS _____ SIGNATURE _____

ADDRESS _____ ADDRESS _____

B-2

MARYMOUNT HOSPITAL
Garfield Heights, Ohio

HISTORY AND PHYSICAL EXAMINATION

Name Gallick, James Age ___ Sex Male Room 301-4 Hospital No. 55-143

Physician Dr. Ippolito Service Surg Date 1-4-55

This 55 years old white, married, Ital. male to the 3rd floor of Marymount Hospital at 3 P.M. on January 4th-55 by Dr. Ippolito.

① Patient had "Biopsy of ulcer of left leg in this hospital on September 22-54.

② Patient had been done "Excision of ulcer of left popliteal region" on September 28-54.

③ Skin-graft: split-thickness on Oct. 18-1954.

④ Excision of lesion of the left side of the neck on October 27-54.

⑤ "Excision of multiple ulcers." on November 23-54.

⑥ "Acute and chronic inflammation with ulceration of skin" given by pathological examination. On November 24-54.

⑦ On September 20-54, the EKG showed "an abnormal record showing some myocardial ischemia and impairment. No evidence of infarction.

The final diagnosis given "Pyodermia gangrenosa" and patient discharged.

Interval note

Head: normal.
ears: No discharge.
Nose: no obstruction, no discharge.
Throat: negative.
Neck: soft.
Chest: symmetry.
Lungs: no rales or rhonchi.
Heart: no murmurs at present.
Abdomen: soft, no tenderness.

GALLICK JAMES
55143 Ippolito
53 yrs Room Bed 1 (over)

Signature _____ M. D.

and Ippolito MD

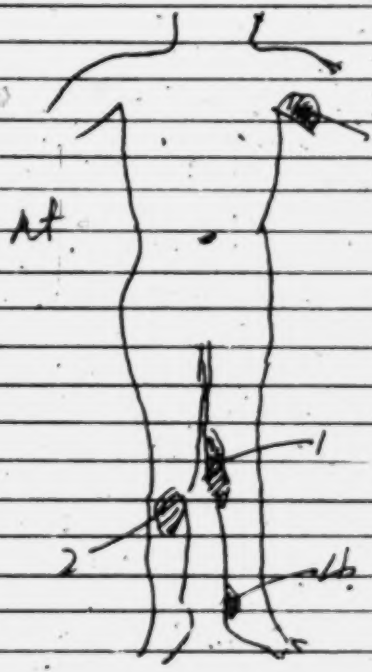
[fol. 1105h]

Liver and spleen not made out.

Extremities: Multiple ulcers on the left axillary region, on the left popliteal region, left achilles region, and at knee. The edge of the ulcer is thin, undermined, outlook like the ulcer of TB.

Reflexes: physiological.

Impression:
pyoderma granuloma lesion of left axillary region, left popliteal region, left achilles tendon region and at knee.



The areas of pyoderma granuloma (1, 2, 3, and 4.)

11051

9.23.55 55143 B-20

Patient was presented to the Cleveland Dermatologic Society as a case of Pyodirma Gangrenosum secondary to insect bite. The diagnosis was accepted & considerable discussion ensued. Many suggestions were offered, all of which have already been employed. The consensus seemed to feel that Ms. Gallick is doing better than the usual case of this type.

Discussions as to mechanism of action centered around either arthus or Schwartzman's phenomenon; as we have believed to be true earlier and to date. The group suggested close follow-up on chest lesion which will be done.

I have been requested to give monthly report to the Society on progress of this dermatological condition.

Dr. Brunsting recently reported (J. of Ohio State Med. Assoc. (Dec, 1954)) use of nitrites of Sal. acid & sulfa pyridine as being occasionally useful; this therapy will be instituted when it is available.

Sol Ziskowitz, M.D.

GALLICK JAMES
55143 Ippolito
53 yrs Room Bed 3

[fol. 1105]

591

MARYMOUNT HOSPITAL
Garfield Heights, Ohio

CONSULTATION RECORD

Date _____ Hospital No. _____

Name _____ Age _____ Sex _____ Room _____

Referred by Dr. _____ to Dr. _____
(Attending Physician) (Consulting Physician)

Findings: _____

Diagnosis: _____

Recommendations: _____

Date _____ _____ M. D.
(Consultant's Signature)

B-21

MARYMOUNT HOSPITAL
Garfield Heights, Ohio

CONSULTATION RECORD

Date 7/23 Hospital No. 56143

Name James Gablick Age 54 Sex M Room 301 S

Referred by Dr. Dr. Appolito (Attending Physician) to Dr. Dr. Bartunek (Consulting Physician)

Findings: 53 year old male with disturbances as noted on the nursing progress sheet.

This patient has a chemotactic dermal granulomatous tissue reaction - according to his history, all beginning with an insect bite.

He has also periods of absolute eosinophilia with leucocytosis - at times when he is not taking steroids.

He has an increase in blood protein and an increase in globulin on electrophoresis.

Believe the pulmonary lesion is a "metastatic" granuloma similar to the ones on the skin. It is possible that the steroids have quieted activity in a quiescent tuberculosis but this, in this patient, is unlikely.

Diagnosis: Feel that the G.I. Bleeding is from a duodenal ulcer which developed during use of Butazolidin

Recommendations: ① Progress films of lungs. Sputa examinations for acid fast organisms. If can be made to present after 7-10 days, then would treat this problem as a granulomatosis - like change with allergic dermal and visceral pruritis as part of the process. With these in mind I would strongly feel that this problem as a symptomatic disease using Nitrogen Mustard I.V.

② Paper Electrophoresis test may be better able to classify this disease according to protein patterns and if it is in phase of lymphomas and lymphoma then Nitrogen Mustard certainly should help.

Date 23 July 55 Thank you (Use Hospital Signature) Robert R Bartunek M.D.

[fol. 1105]

583

HIGHLAND VIEW

ADMISSION HISTORY

10,104

GALLICK,	JAMES			I	JULY	21	1958		
(From: from Cleveland Clinic)									
4403 Devonshire Drive, Parma,		Ohio	Minneapolis, Minn.	July	10,	1901	57		
SKI									
		Marital Status							
White	Male	Catholic	Married	A	2-A	EOJ	2	Home	

Mrs. Mary Gallick - Wife - 4403 Devonshire Drive, Parma, TU 5-1066.

Admission xxxxxx es

Additional xxx es

PLAINTIFF'S EXHIBIT 18

INTERVAL SUMMARY OF HOSPITAL COURSE AND TREATMENT

June 5, 1959

This 58 year old white male was received June 21, 1958 at Highland View Hospital following his transfer from Cleveland Clinic. Both lower extremities were absent to the level of the genitalia, and while the left amputation stump was well healed without cutaneous lesions, the right amputation stump which had been created approximately one month before his transfer here was superficially infected and unhealed along the line of the incision. The patient's transfer diagnosis and the name of the disease necessitating the leg amputations was recorded as pyoderma gangrenosa. The sources of information concerning this patient's past medical history have been the patient, his wife, copies of medical records from Marymount Hospital, the application for admission to Highland View Hospital submitted by Dr. Humphries of the Cleveland Clinic and telephoned information from Cleveland Clinic. Thus far we have not had direct access to this patient's medical record or summaries of his medical record from Cleveland Clinic. We have gained the information pertinent to his medical care and management by telephone from this source.

By history, the first recognized evidence of disease occurred in 1954 on the left lower extremity at the site of an insect bite. His subsequent course over the period of the next four years was apparently characterized by progressive cutaneous gangrene of the skin, predominently of the lower extremities but also involving other lesions over the trunk and upper body some of which were superimposed on donor sites for skin grafts taken to cover lesions over the lower extremities, but other lesions have also appeared and finally healed which were not so clearly related to known injury to the skin. At the time of his admission to Highland View Hospital, there were no skin ulcerations over any site other than the vicinity of the surgical scar over the right thigh amputation stump. The upper right arm was slightly swollen over the triceps region in the area commonly used for intramuscular injections and medications, but there was no evidence of skin disruption at this time.

The initial picture presented to us by this patient, coupled with the various sources of medical history yielded the impression that we were dealing with an individual who had consistently demonstrated a very unusual problem in healing due either to the activity of an unusual infectious agent or agents, not specifically identified, or due to a combination of some intrinsic systemic disorder coupled with infection. Available records indicated that exhaustive efforts had been made at the other institutions to diagnose any unusual infections, other disease, or abnormal conditions known to be associated with poor skin healing.

The patient's course during the first two months in this hospital was characterized by increasing evidences of disease, reflected by progressive enlargement of the wound over the right thigh stump, the dominant features of which were skin necrosis and purulent wound drainage, the appearance of skin necrosis over the upper right arm where swelling had been previously noted, and development of a small cutaneous ulceration over the lower abdomen. There was a progressive decline of his strength and general vitality and the physicians responsible for his care became concerned for his immediate survival of this episode. Several therapeutic measures were instituted within a brief period of time which were followed by improvement, but which, because of the pressure of the circumstances, were not applied in sequential order and therefore, the relative merits of

[fol. 1105]

various procedures could not be later evaluated. The patient was given a number of blood transfusions, dietary supplements, and increased doses of multiple vitamins. Dr. William Chamberlin, our Pathologist, had reviewed slides of skin lesions prepared at Marymount Hospital and had noted large thread-like structures which he believed were strongly suggestive of microfilariae, although their appearance was not diagnostic. In spite of the fact that examination of fresh wound drainage from the patient at this time disclosed no similar structures and furthermore, no one connected with the problem had knowledge of a disease caused by microfilaria which produced the features of Mr. Gallick's problem, it was decided to give him a trial of treatment with Hetrazan which is known to be highly affective against organisms of this type. Generalized improvement was noted in the patient over the period of the next two months, as well as evidence of healing of his local wounds following the combination of therapy enumerated above, coupled with intensive local care of the wounds from day to day. Immediately prior to this interval of generalized improvement, the patient had been transferred to the Surgical Constant Care Division of the hospital, primarily for the reason that he required greater amounts of nursing care and attention than could be practically provided on one of the regular hospital divisions. It is here that he has remained and been under observation for the last ten months.

During this latter period, the patient's general condition has remained relatively stable with regard to his maintenance of stable blood pressure, normal pulse, respirations, body temperature, his ability to eat and maintain a reasonably good state of nutrition. He has reported periodic exacerbations of pain in the right arm and in the right thigh stump, usually associated with visual evidence of activation of these lesions in terms of skin necrosis and drainage. These periods of reactivation of skin lesions have in general become of progressively shorter duration during the last six months and the net effect of all the various measures applied to the wounds has been a gradual healing to the point where he now has only a few small patches over the thigh stump which remain unhealed, similar areas over the right upper arm, and one small lesion in the skin of the scrotum which has been present only during the last six months and at present is showing evidence of healing. A variety of topical agents and ointments has been used without convincing evidence of prolonged benefit with one exception. Most of the healing which has taken place during the time the patient has been at this hospital has occurred while local treatments with Hydrogen Peroxide or Zinc Peroxide were being used. We have regarded this as suggestive evidence that anaerobic organisms are playing at least some role in the persistence of the lesions. Our efforts at culturing unusual disease causing organisms from the wound drainage have not been fruitful. A variety of bacteria have been cultured from time to time which have been of common types and studies for fungus have been consistently negative. More recently, we have been getting a Bacteroides funduliformis in the anaerobic cultures, but there have been other common organisms present at the same time. The more recent behavior of his wounds suggests to us that the continued application of peroxides may eventually be followed by complete healing, although the pitfalls associated with predicting the ultimate fate of ulcers in this man's skin are keenly appreciated by us.

This man's course in the hospital following the initial period of overall degeneration, followed by improvement, has been observed and evaluated by several medical consultants in special fields and certain recommendations and suggestions made are referred to in the record without later notations indicating the degree to which they were carried out or the reasons for their deferral. Some of these items I shall mention briefly.

X-ray films taken during the early months, while the patient was at this hospital were interpreted as being suggestive of osteomyelitis of the right femur. The features in question were not clearly distinguishable from osteoporotic changes in bones commonly seen at the site of amputation and the question of osteomyelitis was finally resolved when the draining wound disappeared in the vicinity of the end of the bone and this area became covered over with normal skin without evidence of persistent infection.

Because of the known association of pyoderma gangrenosum with ulcerative colitis, and because the patient has complained on infrequent occasions of pain in the abdomen, x-ray examinations of the intestinal tract have been obtained on repeated occasions and have yielded no evidence of disease. This patient has not complained recently of abdominal discomfort.

Fluctuations in hemoglobin and red cell count during a brief period about October, 1958 aroused questions concerning a source of chronic blood loss or hemolysis of cells. Subsequent studies including a Coombs' test and bone marrow examination failed to disclose abnormality and the patient's hemoglobin has since remained stable. We finally assumed that the transient anemia was related to infection.

Various tests for obscure diseases which might conceivably contribute to the problems seen in this patient have been carried out here with negative results. Among those tested for have been (1) Vitamin C deficiency, (2) porphyria, (3) urine content for elevated levels of serotonin metabolites, (4) Congo red test for amyloid disease.

Although additional biopsy material for study would be desirable and has been recommended by several examiners, its procurement has been invariably deferred on the basis of this man's well demonstrated propensity to develop spreading lesions after minimal injury.

The viewpoint that the most probable explanation for the chronicity of this patient's healing problems is the coexistence of infection plus an allergic type of tissue reaction has been the one most frequently expressed by consultants who have seen him at this hospital. This opinion has been shared by Dr. Robert Ebert, Chief of Medicine at Western Reserve University and Dr. O. W. Pinkley, our Dermatological Consultant along with other physicians of the Highland View Hospital staff. Dr. Pinkley has favored the diagnoses of Dermatitis Nodularis Necrotica or Von Wegener's Granulomatosis (diagnoses characterized by the above combination of features) and on this basis he recommended ACTH - then later a course of adrenosteroid therapy. We declined to follow this recommendation when we subsequently learned that adrenosteroid-like compounds were used without benefit at Cleveland Clinic during the previous year. On the basis that certain lesions associated with hypersensitivity states (Schwartzmann type reaction) were modified favorably by Heparin, Dr. Ebert recommended a trial on Heparin which was instituted during March, 1959 after it was found that the patient had elevated fibrinogen levels which may occur in that type of condition. No measurable therapeutic response occurred however, and the drug was discontinued after one month. His course since that time has been relatively stable with some slow improvement of wounds.

J. W. Benson

J. W. Benson, M.D.
Chief of Surgery

6-8-59

NAME Gallick, James ADMISSION No. 10,104 DIVISION LC HR

PROGRESS NOTES

Form 4-300

[fol. 1105p]

CASHIER'S OFFICE

MARYMOUNT HOSPITAL
12300 McCRACKEN BLVD
GARFIELD HEIGHTS 25, OHIO

DATE June [illegible]

Mr. James Gallick
4403 Dawshire Ave.
Parma, Ohio

For Hospital Services — Bal. Due

Sept. 18, 1954 to [illegible], 1954 — $2,220.[illegible]

Jan. 4, 1955 to March [illegible], 1956 — 9,626.[illegible]

Total amount due — 11,[illegible]46.[illegible]

SISTERS OF ST. JOSEPH (T.O.S.F.)
THANK YOU

CASHIER'S OFFICE

LAKeview 1-0500

MARYMOUNT HOSPITAL
12300 McCRACKEN BLVD
GARFIELD HEIGHTS 25, OHIO

DATE June 4, 1959

Mr. James Gallick
4403 Dawshire Ave.
Parma, Ohio

Adm. Jan.4,1955 Disch. March 1,1956

For Hospital Services		Bal. Due
Room and Board		
429 days at 16.50	7,078.50	
Blood	425.00	
Lab	223.00	
Operating Room	20.00	
X-rays	35.00	
Drugs, dressings	1,844.75	
		$9,626.25

[Vol. 1106a]

ep

SISTERS OF ST. JOSEPH (T.O.S.F.)
THANK YOU

a

CASHIER'S OFFICE

LUdlow 1-0500

MARYMOUNT HOSPITAL
12300 McCRACKEN BLVD
GARFIELD HEIGHTS 25 OHIO

DATE June 4, 1959

Mr. James Gallick
4403 Dawshire Ave.
Parma, Ohio

Adm. September 18, 1954 Disch. Dec. 6, 1954

For Hospital Services		Bal. Due
Room and Board 81 days at 18.00	1,458.00	
Operating Room	110.00	
Lab	82.00	
EKG	10.00	
X-rays	42.50	
Drugs, dressings, I.V's	517.75	
		2,220.20

SISTERS OF ST. JOSEPH (T.O.S.F.)
THANK YOU

F 113.2

CLEVELAND CLINIC
2020 EAST 93RD STREET
CLEVELAND, OHIO

Mr. James J. Gallick,
4403 Downshire Dr.,
Parma, Ohio.

FOR SERVICES RENDERED

782-829

TO AVOID ERROR RETURN THIS STUB WITH YOUR REMITTANCE.

DATE	SERVICE	DOCTOR	DEBIT	CREDIT	PAY LAST AMOUNT IN THIS COLUMN
1956	BALANCE RENDERED				
July 27	Exam	Netherton	25.00		
30	Special Dressing		15.00		
	Prof. Serv	Green	10.00		
	Diabetic Care	Tretbar	18.00		
Aug. 13	Debridement Ulcer of Leg	Anderson	300.00		
16	Change Dressing		n/c		
20	" "		n/c		
23-27-29-31-Sept. 4-6-10-13-17 26	Change Dressing		n/c		
Nov. 11	Graft Leg Ulcer	Anderson	300.00		
29	Debridement Leg Ulcer	"	300.00		
Dec. 13	" " " " "		300.00		
1957					
Feb. 5	Sternal Marrow	Hewlett	10.00		
Mar. 27	Debridement Leg Ulcer	Anderson	300.00		
Apr. 25	Prof. Serv	Williams	15.00		
May 21	Lt. High Thigh Amputation	Humphries	150.00		
1958					
June 27 to July 21, 1958	prof care in hosp	Curtis	75.00		
	Blood Volume Determination		15.00		
	Xray Therapy Trts (5)	Hays	50.00		
	Prof. Serv	P. Nelson	15.00		
	Consult	Harrison	10.00		
	Prof. Serv.	Vanordstrand Biddleston	25.00	FWD	1,933.00

MAKE CHECKS PAYABLE TO CLEVELAND CLINIC

PLAINTIFF'S EXHIBIT 21

F 113N

CLEVELAND CLINIC
2020 EAST 93RD STREET
CLEVELAND, OHIO

2

Mr. James J. Gallick

FOR SERVICES RENDERED 782-829

TO AVOID ERROR RETURN THIS STUB WITH YOUR REMITTANCE.

DATE	SERVICE	DOCTOR	DEBIT	CREDIT	PAY LAST AMOUNT IN THIS COLUMN
	BALANCE RENDERED				1,933.00
1957					
July 15	Debridement Ulcer Rt. Thigh & Graft	Anderson	1,500.00		
Sept 3	" " " "		n/c		
" 20	S-T Graft Leg Ulcer	"	n/c		
Oct.18	Debridement Amputation Stump Ltl Leg & closure	Secondary Anderson	n/c		
Nov.21	Debridement Ulcer Rt.Leg	"	n/c		
1958					
Apr.8	" " " "		n/c		
June 12	Amputation above Knee Rt.Leg	Humphries	150.00		3,583.00

MAKE CHECKS PAYABLE TO CLEVELAND CLINIC

MAKE CHECKS PAYABLE TO CLEVELAND CLINIC

FORM 135

CLEVELAND CLINIC HOSPITAL

2050 EAST NINETY-THIRD STREET
CLEVELAND 6, OHIO

Mr. James J. Gallick

~~4403 Dawnshire Drive.,~~

Parma, Ohio.

ROOM RATE, INCLUDING — Room, Dietary Service, General Nursing Service, Ordinary Drugs and Dressings — 782-829

			Amount
Room	177 days @	18.50	3274 50
Room	212 days @	19.50	4134 00
Operating Room	6 times		173 50
Anesthesia	6 times		250 00
Blood			350 00
Transfusion Service			52 50
Pharmacy & Tax			1083 83
Lab teste			230 00
Pabh Lab			24 00
Phys. Med Trts			57 50
~~Over~~ Xrays			30 00
Dressings & Supplies			5 00
Telephone & Telegrams			
TOTAL CHARGES from 6/27/57		7/21/58	9664 83

Credits Date	Memo	Amount
	Blood Returned	100 00
TOTAL CREDITS		100 00
BALANCE AS OF		9564 83

Please make all checks payable
TO CLEVELAND CLINIC HOSPITAL

This statement covers charges of the Cleveland Clinic Hospital only and does not include charges for surgeon's fees and services of the Cleveland Clinic

[fol. 1107b]

FORM 21

CLEVELAND CLINIC HOSPITAL

2050 EAST NINETY-THIRD STREET
CLEVELAND 6, OHIO

Mr. James J. Gallick

4403 Dawnshire Dr,

Parma, Ohio

ROOM RATE, INCLUDING — Room, Dietary Service, General Nursing Service, Ordinary Drugs and Dressings — 782-829

		Amount
Room	144 days @ 20.00	2880 00
Room	days @	
Operating Room	18 times	287 50
Anesthesia	18 "	535 00
Blood		940 00
Transfusion Service		150.00
Pharmacy & Tax		405 93
Lab Tests		189 00
Path Lab		20 00
Oxygen		2 50
Dressings & Supplies		
Telephone & Telegrams		2 25
TOTAL CHARGES from 7/30/56 12/21/56		5412 18

Credits Date	Memo	Amount
	Blood replaced	890 00
	Dec. 20, 1956 paid by patient	600 00
TOTAL CREDITS		1490 00
BALANCE AS OF		3922 18

Please make all checks payable
TO CLEVELAND CLINIC HOSPITAL

This statement covers charges of the Cleveland Clinic Hospital only, and does not include charges for surgeons fees and services of the Cleveland Clinic

FORM 125

CLEVELAND CLINIC HOSPITAL

2020 EAST 93RD GETHSEMANE STREET
CLEVELAND 6, OHIO

Mr. James J. Gallick
4403 Dawnshire Dr
Parma, Ohio

782-829

ROOM RATE, INCLUDING — Room, Dietary Service, General Nursing Service, Ordinary Drugs and Dressings —

				Amount
Room	5	days @	18.50	92 50
Room	62	days @	21.50	1333 00
Operating Room				48 00
Anesthesia				70 00
Blood				
Transfusion Service				
Pharmacy & Tax				103 49
Lab				43 00
Xray chest				10 00
Path Lab				10 00
Oxygen				
Dressings & Supplies				
Telephone & Telegrams				

TOTAL CHARGES from 2/5/57 to 4/13/57 — 1,709 99

Credits Date	Memo	Amount

TOTAL CREDITS — none

BALANCE AS OF — 1,709 99

Please make all checks payable
TO CLEVELAND CLINIC HOSPITAL

This statement covers charges of the Cleveland Clinic Hospital only and does not include charges for surgeon's fees and services of the Cleveland Clinic

[fol. 1107-1]

CLEVELAND CLINIC HOSPITAL

CLEVELAND 6, OHIO

Mr. James J. Gallick

4403 Dawnshire Dr

Parma, Ohio.

782-829

ROOM RATE INCLUDING Room, Dietary Service, General Nursing Service, Ordinary Drugs and Dressings

			Amount
Room	58 days	18.50	1073.00
Room	days		
Operating Room			76.00
Anesthesia			60.00
Blood			100.00
Transfusion Service			15.00
Pharmacy & Tax			60.55
Lab			53.00
Oxygen			
Dressings & Supplies			5.00
Telephone & Telegrams			

TOTAL CHARGES from 4/23/57 to 6/22/57 1442.55

Credits Date	Memo	Amount
	Blood Credit	50.00

TOTAL CREDITS 50.00

BALANCE AS OF 1392.55

Please make all checks payable
TO CLEVELAND CLINIC HOSPITAL

This statement covers charges of the Cleveland Clinic Hospital only and does not include charges for surgeon's fees and services of the Cleveland Clinic

CLEVELAND CLINIC HOSPITAL

Mr. James J. Gallick

4403 Dawnshire Dr

Parma, Ohio

ROOM RATE, INCLUDING Room, Dietary Service, General Nursing Service, Ordinary Drugs and Dressings — 782-820

		Amount
Room	days	
Room	days	
Operating Room		
Anesthesia		
Blood		
Transfusion Service		
Pharmacy & Tax		4.12
Oxygen		
Dressings & Supplies		
Telephone & Telegrams		

TOTAL CHARGES from Feb. 2, 1957 — 4.12

Credits Date	Memo	Amount

TOTAL CREDITS — none

BALANCE AS OF — 4.12

Please make all checks payable
TO CLEVELAND CLINIC HOSPITAL

This statement covers charges of the Cleveland Clinic Hospital only and does not include charges for surgeon's fees and services of the Cleveland Clinic

[fol. 1107f]

[fol. 1108]

PLAINTIFF'S EXHIBIT 22

STATEMENT

HIGHLAND VIEW HOSPITAL

3901 IRELAND DRIVE
CLEVELAND 22, OHIO

June 5, 1959

Mr. James Gallick
4403 Dawnshire Drive
Parma, Ohio

FOR (Patient) GALLICK, JAMES

PLEASE RETURN THIS STUB WITH YOUR CHECK

DESCRIPTION	DATE	CHARGES	CREDITS	BALANCE
Admitted 7-21-58				
July 11 days @ $ 17.00/da.	July '58	187.00		
Initial Blood	Aug. '58	25.00		
August 31 days @ $ 17.00/da.	Aug. '58	527.00		
Blood	Sept. '58	25.00		
September 30 days @ $ 20.00/da.	Sept. '58	600.00		
October 31 days @ $ 20.00/da.	Oct. '58	620.00		
Blood	Oct. '58	25.00		
Blood (2)	Oct. '58	50.00		
November 30 days @ $ 20.00/da.	Nov. '58	600.00		
December 31 days @ $ 20.00/da.	Dec. '58	620.00		
5 Pts. of Blood replaced	Dec. '58		125.00	
1959				
January 31 days @ $ 20.00/da.	Jan. '59	620.00		
February 28 days @ $ 20.00/da.	Feb. '59	560.00		
March 31 days @ $ 20.00/da.	Mar. '59	620.00		
April 30 days @ $ 20.00/da.	Apr. '59	600.00		
May 31 days @ $ 20.00/da.	May '59	620.00		$ 6,174.00

THE REYNOLDS & REYNOLDS CO., DAYTON 1, OHIO

HIGHLAND VIEW HOSPITAL
CLEVELAND 22, OHIO

Form A-23

MY NAME IS WILLIAM CLASON
I LIVE AT 10918 St. MARK AVE.
I HAVE BEEN LIVING AT THIS
ADDRESS FOR THE PAST 12 YRS.
MY PHONE NUMBER IS CL 1-3397
I AM EMPLOYED AS A BRAKEMAN
FOR THE B+O RAILROAD FOR THE
PAST 11½ YEARS.

JAMES GALLICK AND I WORKED
TOGETHER OFF AND ON FOR
ABOUT TEN YEARS. BACK IN
AUGUST, THE EARLY PART, OF 1954
WE WERE WORKING WHAT IS
CALLED THE DOWNTOWN AREA.
IT WAS ABOUT THIS PERIOD OF
TIME THAT HE BID IN FOR A
WEST END JOB. AFTER HE WAS
GONE FOR ABOUT TWO WEEKS A
CLAIM AGENT FOR THE RAILROAD
CAME OVER AND SAID HE WANTED
A STATEMENT FROM ME IN RELATION
TO JAMES GALLICK AS HE HAD
BEEN BITTEN BY AN INSECT
WHILE HE WAS WORKING THE
DOWNTOWN AREA. OUR JOBS WOULD
TAKE US FROM THE NICKEL PLATE
JUNCTION TO WHISKEY ISLAND
DURING THE COURSE OF A DAYS
WORK. A PART OF EACH DAYS WORK
TOOK PLACE BY LIME RD. NEAR
THE COLUMBUS ROAD BRIDGE. NOW

William Clason

[fol. 1109].

PLAINTIFF'S EXHIBIT 23-A, 23-B, 23-C

William Olson

WE ALWAYS WORKED PART OF OUR DAY HERE. THERE IS A TRACK OF THE B&O RAILROAD WHICH GOES UNDERNEATH THE COLUMBUS RD BRIDGE AND IT IS IN A DEPRESSED & LOWER AREA. AS A RESULT THERE IS A SWAMP THERE. THERE MUST ALWAYS BE ABOUT A FOOT OF WATER OR MORE THERE IN EVEN GOOD WEATHER AND DURING THE RAINY WEATHER IT IS MUCH WORSE. THERE IS NOT ENOUGH DRAINAGE THERE OR ELSE ITS CLOGGED UP. NOW -- PAUL DeLOOA THE SECTION FOREMAN HAS MADE SEVERAL ATTEMPTS TO CLEAR THIS SWAMP UP BUT IT WAS NEVER SUCCESSFUL ALTHOUGH IF THEY PUT IN A DRAINAGE DITCH DEEP ENOUGH THEY COULD RUN IT TO THE RIVER WHICH IS ONLY ABOUT 250 FEET AWAY AS A RESULT OF THIS CONDITION THERE ARE QUITE A BIT OF BUGS, RATS, INSECTS AND DEAD ROTTING PIGEONS THERE. THE CONDITION WAS BAD SEVERAL YEARS AGO AND IS STILL BAD. I IMAGINE THAT IF JAMES GILLICK WAS BITTEN BY A INSECT IT

COULD HAVE COME FROM THIS
AREA I DON'T KNOW WHERE
OR HOW. JAMES GALLICK WAS
BITTEN. I GAVE THIS INFORMATION
IN A SIGNED STATEMENT TO
THE CLAIM AGENT FOR THE
RAILROAD.

I have read this and it is true
William Shaw

My name is Joseph J. Corrigan
I live at 1516 Rock Maury Ave.
My phone number is [illegible]
I am married + have five
children. I am employed for almost
the past 11½ years as a trackman
for the B + O Railroad. Back in
August of 1954 I heard that
James Hallock, a fellow worker
with me was bitten by a
insect [illegible] with him
the day that he was bitten
although we have worked together
for periods of up to six months
at a time. After James Hallock
was injured I never had the
occasion to see him again.
I heard later on that he was
in bad shape and was unable
to do any work.
I have heard several reports
of how he was injured. One
of these seemed to be that he
was bitten by an insect at the
C + O yard at 23rd Bird street
and Greenleaf St. and another
place at a Ditch which lies
along the B + O right of way
between Columbus Rd Bridge
and the Carter St Bridge; At a
point between these two Bridges that

tracks are in a low spot and as a result water and sewage gathers here. I have been here, employed by the railroad and that sewage and water has been there for at least fifteen years. There has been dead birds and pigeons there also and perhaps the insects have come from that. The only thing the railroad would have to do to get rid of this pool of water and sewage and other dead animals and birds would be to put in a sewage system. There may be a sewage system there but it may be clogged up.

Joseph F Casey

[fol. 1110a]

Jan. 9, 1950

Gallick J.I.
1629 E. 86 St.

Patient of Dr. Heller -

Dia. to back - Will return Tues. P.M.

DEFENDANT'S EXHIBIT A

[fol. 1111]

(Front)

12-4-50

GALLICK - JAMES

1471 CRAWFORD CA. QP

12/1/50 Jumping off of locomotive
" Hurt his thigh
OE. B & C Achilles. Rupture muscle fibers. Instructed Remarkage.
IH Heat. Support. Instruction

(Back)

12-4-50	OC		Pd
12-8	OC		Pd
12-12	OC	~~Ext~~	3 -
	X Ray		10 -

Ret work 12/9 - performance
12-14 had to quit
12-16
12-18 OC
12-20 OC
12-27 OC
1-2-51 OC

~~N 1951 OC~~
1951 OC
" 6, 8, 10 dia.
1-15 "
1-22 "

1-25 OC
1-27 OC
1-29
2-3 OC

DEFENDANT'S EXHIBIT B

605

(Front)

DEFENDANT'S EXHIBIT C

GARRICK. MRS JOHN.

1471 CRAWFORD Rd (N) J'.

Pain in chest & lower back.

PC xRay req Pneumonia
Very oppressive

AC Cl Lobar pul - req Rest in.

(Back)

3.10.51 AC
xRay

10 -

pd 13 -

(Front)

DEFENDANT'S EXHIBIT E

GALLICK - J. E 1-31-53
4403 DAWNSHIRE DR. (P) P suppl. list E
PARMA, (D).

Bgs 152/88

04 Bf x Bt2

(Back)

5-X

CK returned 10

APR 1 1953 S

1. X 4

(Front)

GALBICK JOHN

Inf R leg sept 2nd F

RH viral syndr and dem Pen

IIIIF

(Back)

8 no ref 6 x

8 ref ac Red Pen 6 /

9-2 ac Red: no Pen 3 -

9-7 ac Red. DNS 6 -

IIIIF

C

1

DEFENDANT'S EXHIBIT F

[fol. 1112]

DEFENDANT'S EXHIBIT G-1

Deft Ex. G-1

Illin. 3-10-51. THE BALTIMORE AND OHIO RAILROAD COMPANY Form 703 B—Rev.

TIME RETURN AND DELAY REPORT OF YARD TRAIN EMPLOYEES

AKRON 9 AUG 10 1954

No. Division Engineer Date

Length of Time off Duty Prior to This Trip	FIRST WENT ON DUTY Place	Date	Time	FINALLY WENT OFF DUTY Place	Date	Time	Total Time on Duty Hrs.	Min.	IDENTIFICATION NO. & NAME	Occupation
16	Cleveland, O	AUG 10 1954	2:30	Cleveland, O.	8/10	11:P	8		- 48654 James J Gallick	Fireman
									[redacted]	Ydmn
									44175 WILLIAM L. CLASON	Helper
									57890 WILLIAM MOLNAR	Helper
8									66412 CHARLES R. VALEK	Helper

REMARKS: Allow 95¢ Coupling Air Hoses Lower ya - 8.

FOR TIMEKEEPER'S USE ONLY

AUDIT 64726

Occ. Code No.	Straight Time Actually Worked	Hours Paid	Overtime Hours	Cont. Allow. Amount	Cont. Allow. Code	Rate Code
3						
4						
4						
4						

RUN NUMBER | TRIPS

DETAILS OF SERVICE

RUN NUMBER	ENGINE	DEPARTURE Station	Time Called for	Time went on Duty	Time Train Departed	ARRIVAL Station	Time Train Arrived	Time went off Duty	Kind of Service Yard Work, Work, Etc.
2	810	Cleveland, O	2:30	2:P	3:P	Cleveland, O.	11:P	11:P	Yard

APPROVED FOR OVERTIME, NOT MORE THAN [illegible]

for P Gordon

TIME CLAIMED

STRAIGHT TIME 8 hrs OVER TIME —

OTHER TIME —

I HAVE READ AND HEREWITH SIGN FOR ALL GENERAL ORDERS UP TO AND INCLUDING

Akr. DIV. G. O. NO. 15

DIV. G. O. NO.

DIV. G. O. NO.

I CERTIFY THIS REPORT TO BE CORRECT:

Signature James Gallick Occupation Fireman

Correct as to time went on duty Correct as to time finally went off duty

E Robinson Ctl mus

[fol. 1112a

DEFENDANT'S EXHIBIT 622

Def'l Exh. Y-2

THE BALTIMORE AND OHIO RAILROAD COMPANY

TIME RETURN AND DELAY REPORT OF YARD TRAIN EMPLOYEES

AUG 12 1954

No. ... Division AKRON ... Engineer ... Date ...

Length of Time of Each Duty & This Trip	FIRST WENT ON DUTY: Place	Date	Time	FINALLY WENT OFF DUTY: Place	Date	Time	Total Time on Duty: Hrs.	Min.	IDENTIFICATION NO. & NAME	Occupation
16	Cleveland, O	AUG 12 1954	3P	Cleveland, O	8/12	11-P	8	-	48654 JAMES J. GALLICK	Fireman
									44175 WILLIAM I. CLASON	Helper
									57890 WILLIAM MOLNAR	Helper
									64778 CLOYD W. STINE	Helper

REMARKS: Allow gas Coupling Air Hoses Lower yard

Occupation	Code No.	Straight Time Actually Worked	Regular Paid	Overtime Hours	Constr. Allow. Amount	Constr. Allow. Code	Rate Code
Fireman	3	8					
Helper	4						
Helper	4						
Helper	4						

FOR TIMEKEEPER'S USE ONLY

AUDIT 64922

RUN NUMBER	TRIPS

DETAILS OF SERVICE

RUN NUMBER	ENGINE	DEPARTURE: Station	Time Called for	Time went on Duty	Time Train Departed	ARRIVAL: Station	Time Train Arrived	Time went off Duty	Kind of Service (Yard Work, Wreck, Etc.)
2	521	Cleveland, O.	3P	3-P	3-P	Cleveland, O.	11-P	11-P	Yard

APPROVED FOR OVERTIME AND BOOK

TIME CLAIMED

STRAIGHT TIME 8 hrs + OVER-TIME —

OTHER TIME —

I HAVE READ AND HEREWITH SIGN FOR ALL GENERAL ORDERS UP TO AND INCLUDING

AKr DEV. G. O. NO. 15

DEV. G. O. NO.

DEV. G. O. NO.

I CERTIFY THIS REPORT TO BE CORRECT:

Jamie Gallick Conductor Foreman

Check up to time off duty Checked up to time back on duty

[illegible] [illegible]

1005I 9-24-52 Form 790

THE BALTIMORE AND OHIO RAILROAD COMPANY

REPORT OF PERSONAL INJURY

Report No. 20 — October 20 (Date of Report) 19 54 — Akron Division

G PCC WRG ICW AJS DAW HGC LWB HJS

Location Cleveland (Nearest Station) State Ohio Date August 10, 19 54 Time Began work 3:00 PM Injured 4:00 PM

Train Yd. Engine 510 Loads 0 Empties 0 Adj. Tons 0 Speed - Weather Clear

Number of cars with air brakes in working order - Was bell rung - Was whistle sounded -

Engineer P.English — Porter

Fireman N.S.Briggs — Brakeman W.I.Clason

Conductor J.J.Calliek — Brakeman Wm Molnar HE 1-0852

Baggage Master — Brakeman C.R.Valek

Person Injured James J.Calliek — Age 53 — Single, married, widowed or divorced Married

Residence 11403 Dunsmire Dr. — Nationality American — Race White — *RD Cert. No.

Speak English Yes — *Number children under 18 years 0 — *Member of Relief Dept. Yes

Occupation Yd. Foreman — *Length of experience 10½ Yr. — Piece or time worker time

*Working— Days per week 5 — Hours per day 8

Nature and extent of injury Insect bite back of left leg at knee joint

Cause Not known

If accident due to a defect describe fully

Was a safety rule violated No

Who will investigate this accident C.R.Gordon, TTM

What action will be taken to prevent a similar accident

What was done with injured person and by whose orders Continued working until September 12th under care of family physician and hospitalised September 18th on orders of family physician due to infection setting in.

What does injured person say

Was person deaf, blind, intoxicated, insane, asleep or negligent No

Estimated duration of disability Not known

WITNESSES:	Name	Occupation	Office Address
	None		

BALTIMORE & OHIO R.R. OCT 22 1954 CLAIM AGENT-AKRON, O.

Remarks: Walking along Line Road to West Street Team Track under Columbus Road Bridge when I was bitten by insect inside pant leg.

Disregard questions marked (*) when reporting injury to persons other than employes.

In case of injury to employes report should be rendered by their immediate superior. If he has no personal knowledge of the accident he should so state on report, giving, however, all the facts he has been able to develop.

Correct: James J.Calliek

Yd. Foreman (TITLE)

(TITLE) (21)

Rev. 6-11-48 Form 1062-B-Rev. Wolfe Exh I-1

The Baltimore and Ohio Railroad Company

Accident to James J. Ballick at Cleveland, Ohio Date 8-10-54

Statement of James J. Ballick Married / Single Occupation Brakeman & Conductor

Age 53 Years. Residence 4463 Devonshire Drive, Parma 29 Ohio

Made to Wm H. Robinson on the 2nd day of November 1954

At Management Hospital, Garfield Hts. Ohio

In the presence of I have been in B&O Service since 1944 On August 10, 1954 I was working my regular job, Cleveland Yard Job No 2, 2nd Trick, as Yard Foreman. The weather was hot, clear and dry. Any anyone was in the No 2 track of the Spur Yard when it had shoved some cars and was coming out Light, and I had given the Engineer instructions to go to the River track and become clear. That the engine was coming ahead I walked from the track over to the West West Team track to check the cars. I was walking on the left side of the Tracks going west and was directly between the Columbus Road Bridge when suddenly I felt something sting or bite my left leg just about 4 inches above my knee on the left side of my leg next to the instep. I was wearing khaki trousers and when I felt the bite or sting I stuck at it and could feel what felt like a large bug or insect I could not see it as it was inside my Trouser leg, but I could get hold of it through my trousers with my fingers and squeezed it and I heard and felt it pop under the pressure. After the occurrence I could still feel the effect of it and it felt like an insect bite. I reported to my Foreman my injury shortly after that, that I had gotten a bite. I was treated with my work and after I

(Over)

WITNESS: William O'Meara X James J. Ballick

1114

DEFT EX A 4-25-57 RH

[fol. 1114]

DEFENDANT'S EXHIBIT I-1, I-2

Def's Exh 2

Log. 11148

11144

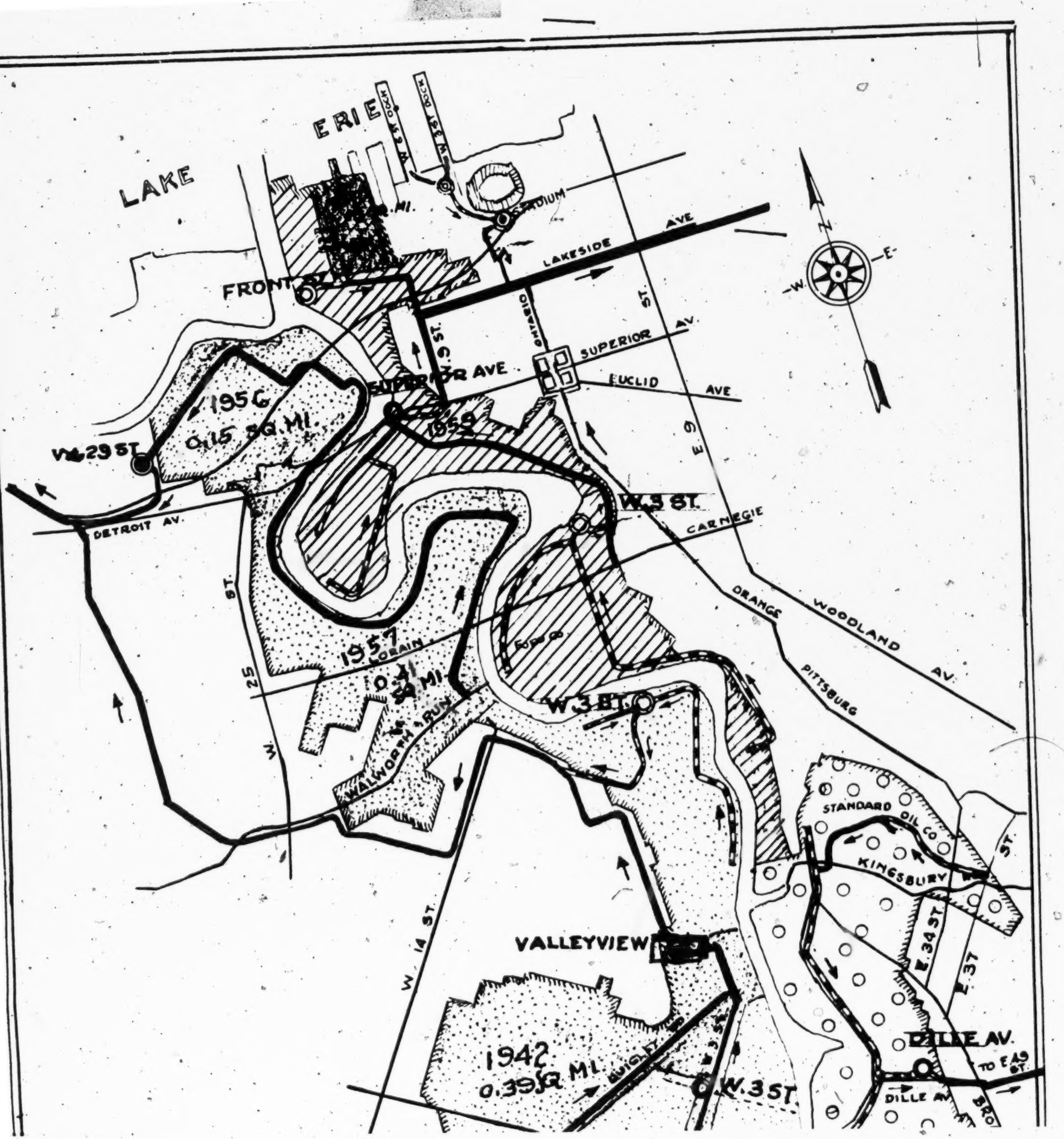
get home I told My Wife about it. All that time it appeared to look like a mosquito bite with a small spot white in color in the middle but soon swelling commenced at it had more than often symptoms, and had to open in three or four places and then take a long time in a normal state of my return & prior to that I had had but two days except that at fall time a big about 3 days late. My wife told me that the bite was getting like a bad bite I had a doctor dressed it & the sore began to open and I noticed at that time I got home to the 1st day I saw Dr Hallett he told me I took the wrong step in taking upon the advice of Dr Hall & left Dr Hallett & went to Dr Hall & called Dept 11. By that time the sore began to close & continued to heal up to about 1 week after I saw Dr Hall. All the time I got the bill was working, may be good but the last time I went back to the office of the Dr. The girl there told the people behind to the back as that was my turn & then called me & left me alone with Dr Hall & then I saw Dr Hall & he told me that I had to pay the bill & that was all. I think that Dr Hall was rather hard to deal with & I have had a lot of trouble. From time to time I have noticed that I am frequently troubled on hand & arm & ankles, & all week in the beginning of June last & the last week I can with reference to the cause of my trouble that I have obtained about above.

Have You read your foregoing statement or had same read to You

NOTE—Have witness give names of all other persons he knows of that were witnesses to the accident. Have witness sign statement which should be attested by the person taking same.

& is it correct to the best of your knowledge?

WITNESS William H Kemp X


LAKE ERIE
W. 9TH DOCK
W. 3RD DOCK
STADIUM
LAKESIDE AVE
FRONT
OHIO ST.
E. 9 ST.
SUPERIOR AV
SUPERIOR AVE
EUCLID AVE
1956
0.15 SQ. MI.
1959
W. 29 ST.
DETROIT AV.
W. 9 ST.
CARNEGIE
ORANGE
WOODLAND AV.
PITTSBURG
1957
LORAIN
0.31 SQ MI
W. 3 ST.
WALWORTH RUN
W. 25 ST.
W. 14 ST.
STANDARD OIL CO
KINGSBURY
E. 34 ST.
E. 37 ST.
VALLEYVIEW
1942
0.39 SQ MI
W. 3 ST.
DILLE AV.
DILLE AV.
TO E. 49 ST.
N
S
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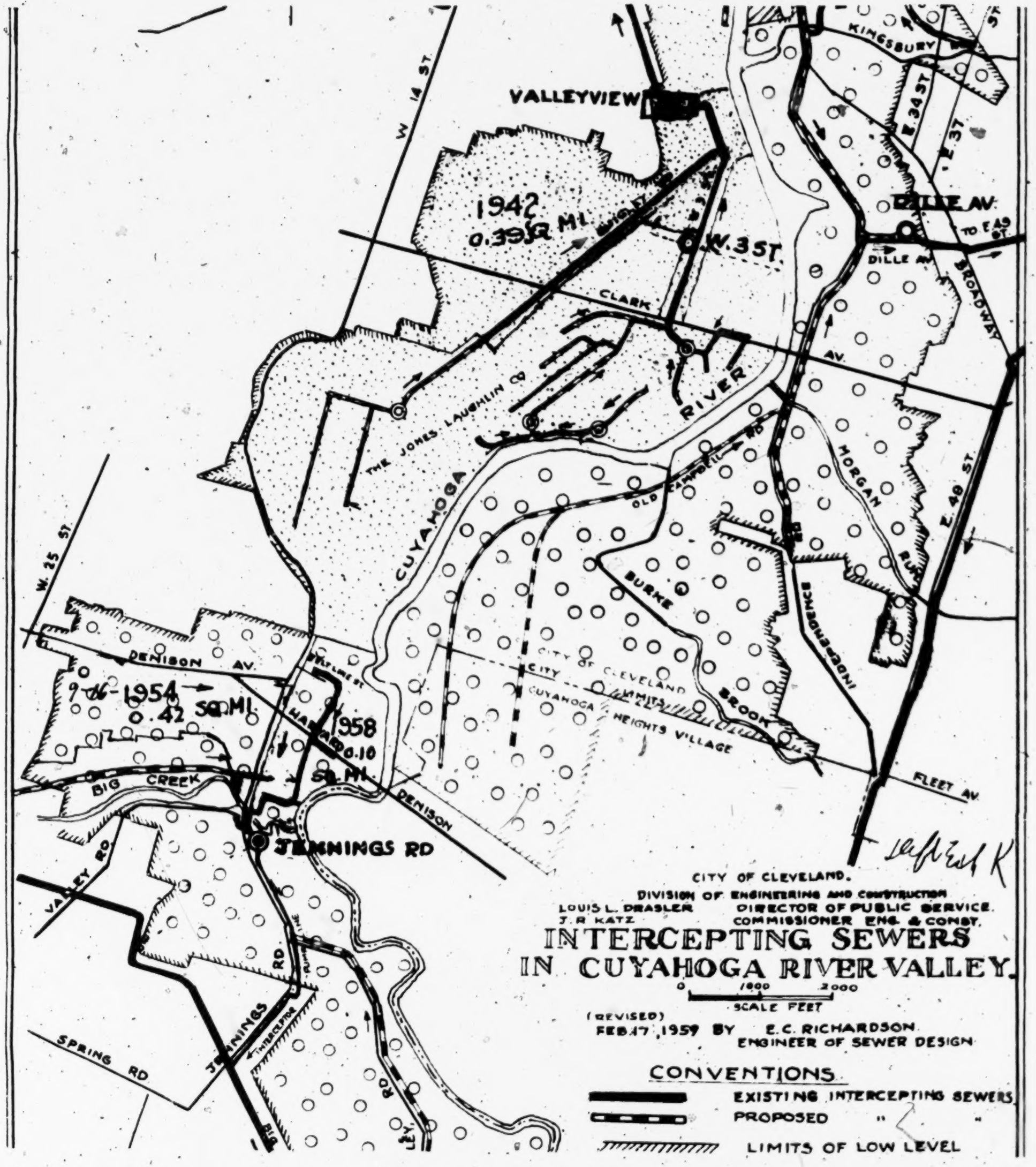
W



CITY OF CLEVELAND.
DIVISION OF ENGINEERING AND CONSTRUCTION
LOUIS L. DRASLER — DIRECTOR OF PUBLIC SERVICE.
J. R. KATZ — COMMISSIONER ENG. & CONST.

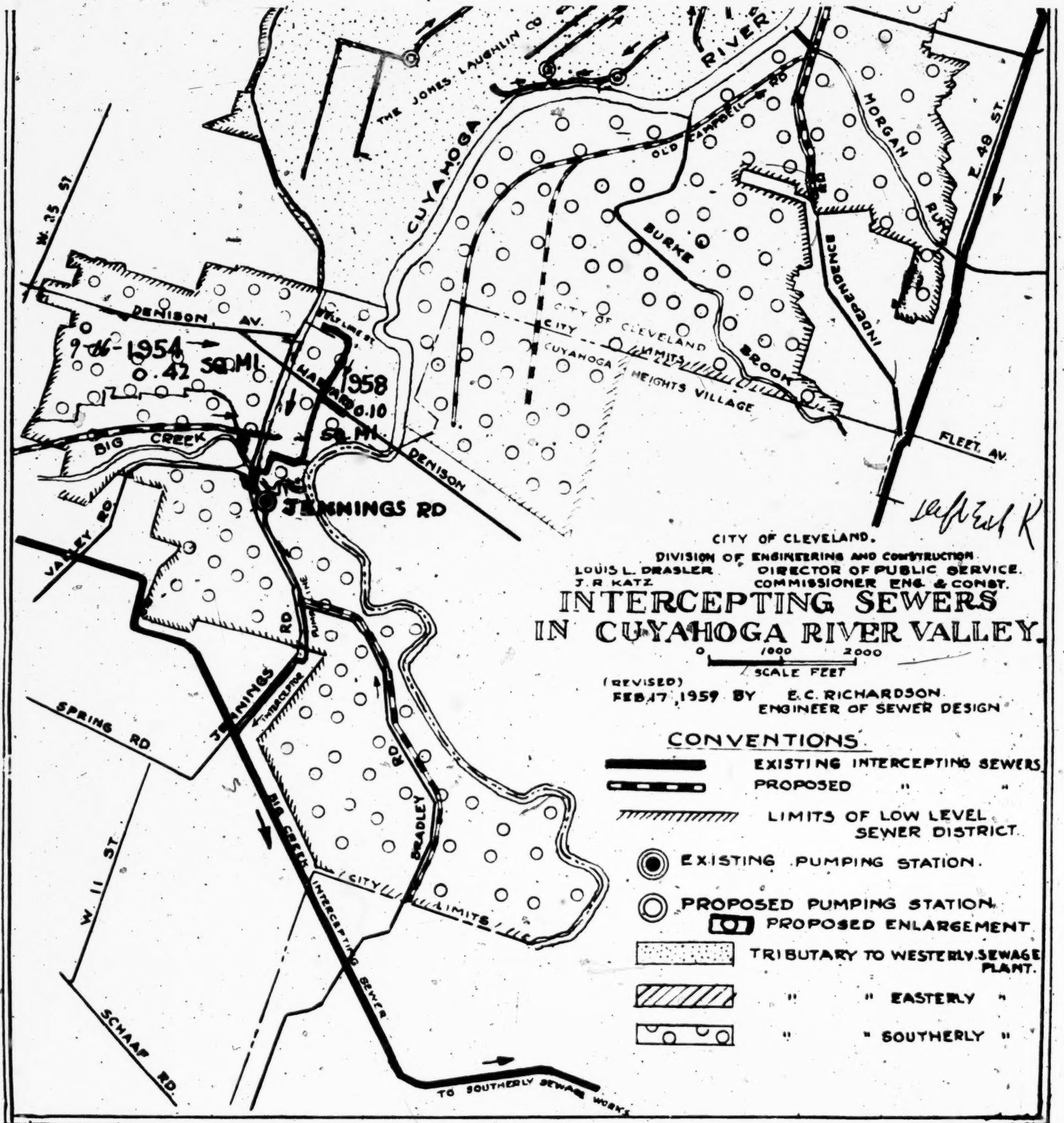
INTERCEPTING SEWERS IN CUYAHOGA RIVER VALLEY.

0 1000 2000
SCALE FEET

(REVISED)
FEB. 17, 1959 BY E. C. RICHARDSON
ENGINEER OF SEWER DESIGN

CONVENTIONS

EXISTING INTERCEPTING SEWERS
PROPOSED " "
LIMITS OF LOW LEVEL



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INTERCEPTING SEWERS IN CUYAHOGA RIVER VALLEY.

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SCALE FEET

(REVISED)
FEB. 17, 1959 BY E. C. RICHARDSON.
ENGINEER OF SEWER DESIGN

CONVENTIONS

- EXISTING INTERCEPTING SEWERS
- PROPOSED " "
- LIMITS OF LOW LEVEL SEWER DISTRICT.
- EXISTING PUMPING STATION.
- PROPOSED PUMPING STATION.
- PROPOSED ENLARGEMENT.
- TRIBUTARY TO WESTERLY SEWAGE PLANT.
- " " EASTERLY "
- " " SOUTHERLY "

MAP No. 8

[fol. 1116]

DEFENDANT'S EXHIBIT N

(See opposite) ☞

CLEVELAND OHIO

31+71 Channel Line
31+78.8 ℄ End Rest Bearing

SUPERIOR VIADUCT

COLUMBUS ROAD

CANAL

JAMES ST.

WEST 5TH ST.

LIME ST.

5°00'
17°00'
B. No 462N

BR. No 462M

BR. No 462

13°00'
05'32"

(4308)

(4307)

T-VIAA(W) L=59'-2"

T-VIAA(E) L=500'-2"

T-VIAA(S) L=719'-0"

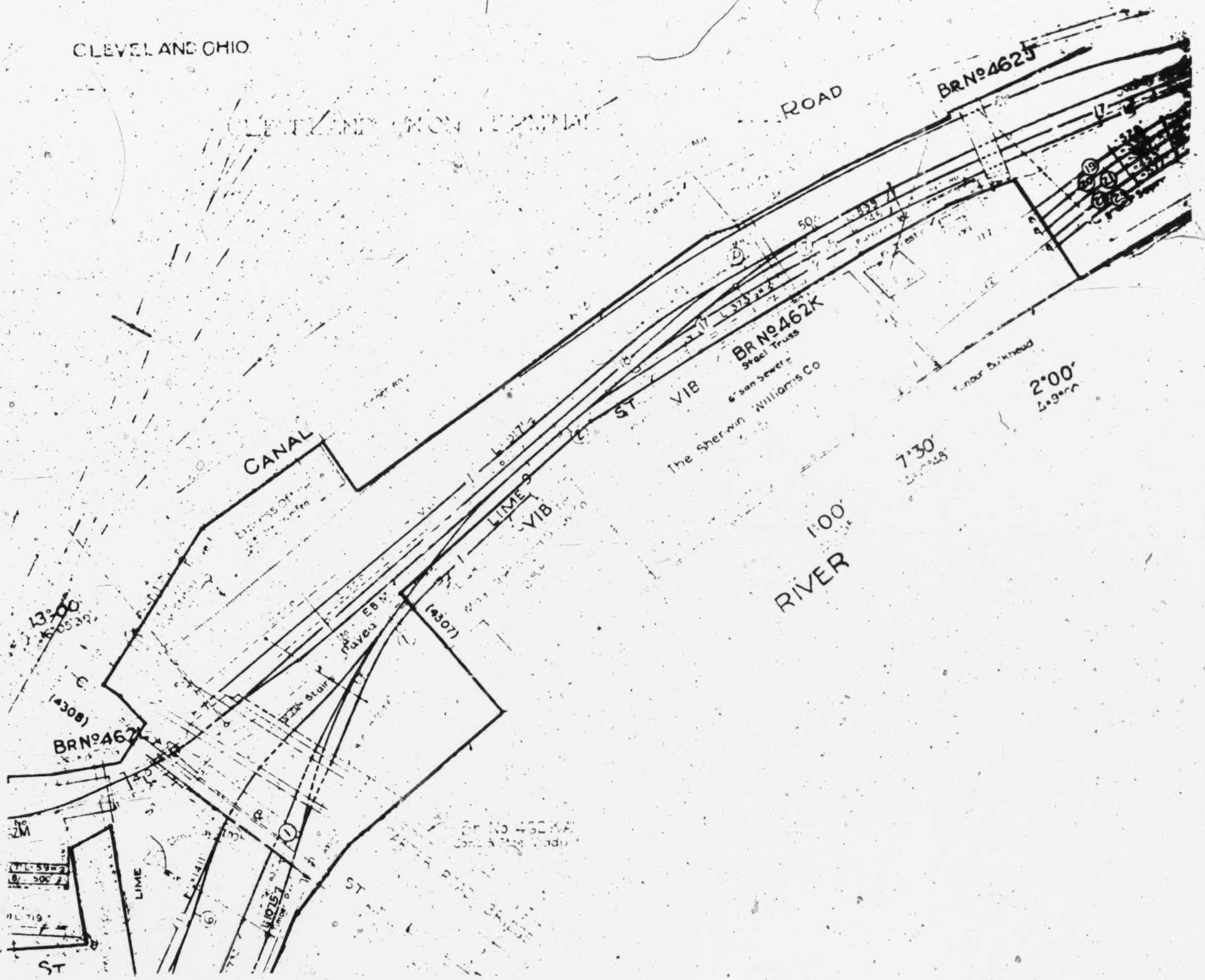
EB Paved Stairs

LIME

VIB

ST

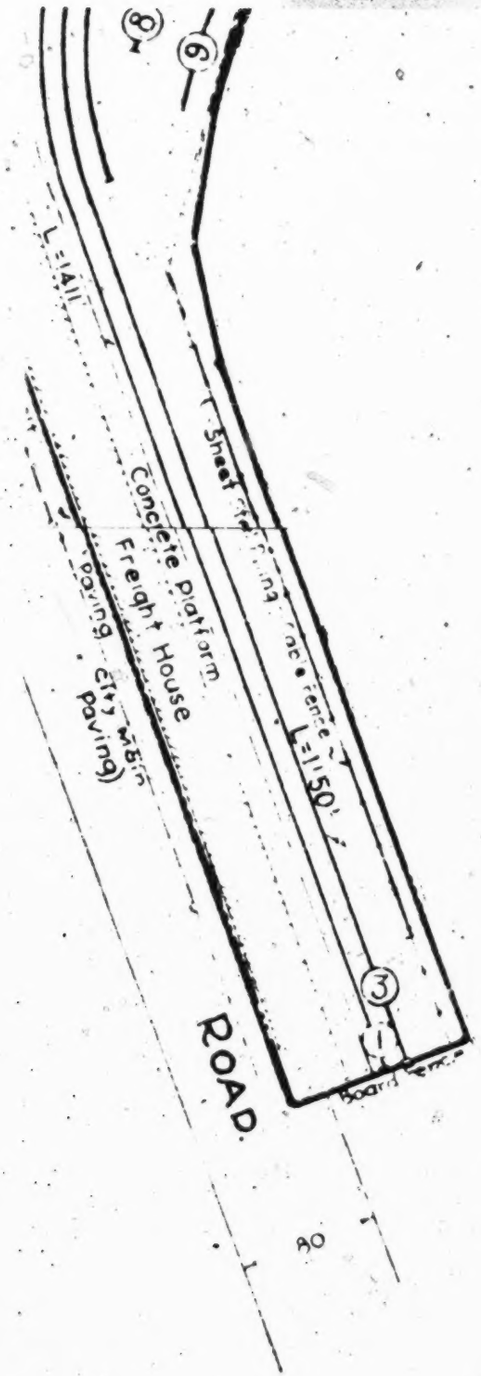
CLEVELAND OHIO



WEST
ST.
Br. No 462 M.L.
6°00'
COLUMBUS RD.
LIME
CUYAHOGA
DETROIT
MERWIN
ST.
CENTER
FALL ST.
COLUMBUS
ST.
WINTER
COLUMBUS FREIGHT YARD
Concrete Platform
Frame House
Existing City Paving
ROAD

THE BA

AK



Default N

STATION MAP - TRACK

THE BALTIMORE AND OHIO RAILROAD COMPANY

OPERATED BY

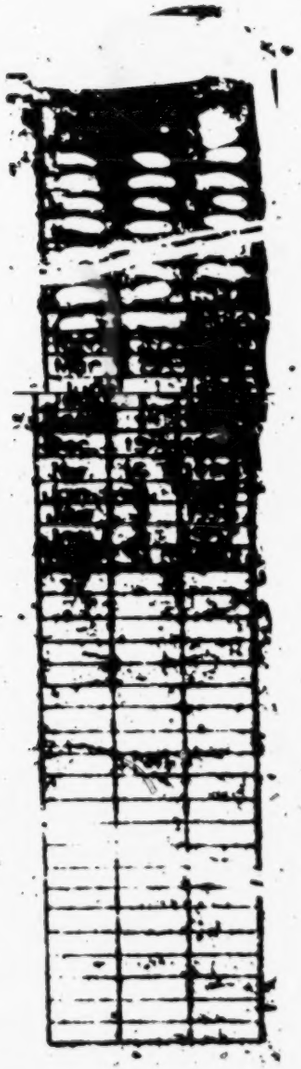
THE BALTIMORE AND OHIO RAILROAD COMPANY

AKRON DIVISION — C. T & V. BRANCH

STATION — TO STATION

SCALE: 1 IN [illegible] FT — JUNE 30 [illegible]

OFFICE OF VALUATION ENGINEER
BALTIMORE, MD.



PHENSIANT'S

[fol. 1117]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT

State of Ohio, Cuyahoga County, ss.

No. 23,087

JAMES GALLICK, Appellee,

v.

THE BALTIMORE AND OHIO RAILROAD CO., Appellant.

OPINION

Hunsicker, J.

James Gallick, an employee of Baltimore and Ohio Railroad Co., brought an action in the Common Pleas Court of Cuyahoga County, Ohio, under the Federal Employers' Liability Act, alleging that he suffered injury because he was not furnished, by his employer, a reasonably safe place to work, and was required to work under unhealthful and unsanitary conditions.

Mr. Gallick, along with other employees of the Baltimore and Ohio Railroad Co., was engaged, over a period of time, at a place known as the "230 Seneca Street job." The location of the work was in the "flats" section of Cleveland, Ohio, a highly industrialized area adjacent to the Cuyahoga River, a short distance south of the river's entrance into Lake Erie. Specifically, Mr. Gallick, the foreman of the railroad crew, along with others, spotted [fol. 1118] cars to be moved into the yards, or to industrial establishments. He was required, during the month of August, 1954, to walk along a B & O Railroad right of way, consisting of one line which ran along the river near the industrial plants serviced by such railroad.

This railroad line passed under several bridges, among which was the Columbus Street bridge. Under this bridge, on the east side of the railroad right of way, was a ditch,

which, for many years, contained stagnant water, both in the dry and wet seasons of the year. In and about this ditch were dead and decayed rats and pigeons. Insects were seen on, over and about this stagnant pool. The evidence shows that the condition of this pool was known to the employees of the railroad for a long time before the occurrence about which Mr. Gallick complains.

Mr. Gallick, on or about the 10th day of August, 1954, while walking along the west side of the railroad right of way, under and also near the Columbus Street bridge, stopped momentarily to see where the railroad engine was that would pick up some cars. He then took a step or two, at which time he felt a bite on his left leg, a few inches above his left knee. He put his hand on the place where he felt this bite, and grasped between his finger and thumb an object which he said felt like an insect, and which, when squeezed, cracked or popped. This object, or insect, was inside his left trouser leg. When he released the object it slipped out of his left trouser leg. Before he could locate it, the engine was nearby, and he boarded one of the cars. Mr. Gallick said the object was about as long as the width of three fingers, and as thick as his little finger. [fol. 1119] The size of the insect was thus indicated to be about two inches long by one-half inch wide.

Later that day, after his lunch period, about 7 o'clock p.m. (Mr. Gallick worked from 3 p.m. until 11 p.m.), he went to the washroom; and, because he felt some sensation on the back of his left leg, he washed the place where he had felt the bite. When he arrived home after work, he showed this place to his wife, who said it looked like a bite, and that it was pink on the top, and about the size of a fingernail. It grew redder and larger, and, since it did not heal, but broke open like a boil, Mr. Gallick went to a doctor, several days after the alleged bite, who administered penicillin and gave an ointment for dressing the by-now open lesion.

The wound did not respond to treatment, and another doctor was consulted. The condition grew progressively worse, until, after several years of hospital attention by many, many doctors, examinations, tests and treatments,

including the amputation of both legs, Mr. Gallick is permanently confined in a hospital suffering from many severe pus-forming lesions on his body. It was stated by one of the doctors who treated him that one arm may have to be amputated to relieve the effect of a lesion in the armpit. None of the doctors who have treated and studied his case can give the etiology of his condition.

One hospital and some of the doctors state the condition of Mr. Gallick to be "pyoderma-gangrenosa, secondary to insect bite."

The trial of Mr. Gallick's action against B. & O. Railroad Company proceeded upon two claimed grounds of [fol. 1120] negligence: first, "(4) In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties"; and, second "(6) In that it knew that, by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions."

Baltimore & Ohio Railroad Company, denying any negligence on its part, said that, if the condition of Mr. Gallick arose from an insect bite sustained by him while working upon railroad property, "the likelihood of harm and consequences" to Mr. Gallick from such bite "were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose requiring the exercise of care by" the railroad "to protect" Mr. Gallick "from any such risk."

After a lengthy trial, and the submission of the case to a jury with a special verdict and numerous interrogatories, a judgment for $625,000 was entered by the Court of Common Pleas.

From this judgment an appeal on questions of law has been brought to this Court by Baltimore and Ohio Railroad Co., which set out sixteen assignments of error, as follows:

"1. The court erred in overruling defendant's demurrer to plaintiff's petition.

"2. The court erred in reducing the seated panel to 10 jurors by excusing two seated members of the jury panel of twelve at the request of the two jurors, after defendant had exhausted its four peremptory

challenges to such panel and plaintiff had not exhausted its peremptories, and in proceeding further [fol. 1121] with the remaining panel of 10 over defendant's objection.

"3. The court erred in limiting the jury's view of defendant's premises and surrounding territory to a very small part of the area which was relevant and pertinent to the issues in the case and about which there was evidence presented at the trial.

"4. The court erred in admitting evidence offered by plaintiff over the objection of this appellant.

"5. The court erred in overruling defendant's motion for judgment on the pleadings, and for a directed verdict at the close of plaintiff's case and at the close of all the evidence.

"6. The court erred in refusing to give to the jury before argument certain written requests to charge submitted by this appellant.

"7. The court erred in submitting to the jury before argument certain special charges submitted by the adverse party and objected to by this appellant.

"8. The court erred in its charge to the jury.

"9. The court erred in refusing to submit to the jury certain special interrogatories to be answered by the jury, as requested by appellant.

"10. The court erred in submitting to the jury an improper, misleading, and incomplete special verdict.

"11. The court erred in entering judgment for plaintiff upon the special verdict returned by the jury, and in not entering judgment for the defendant thereon.

"12. The court erred in overruling appellant's motion for judgment notwithstanding the verdict.

"13. The court erred in overruling appellant's motion for a new trial.

[fol. 1122] "14. The damages assessed by the jury in its special verdict are excessive and appear to have been given under the influence of passion and prejudice.

"15. The damages assessed by the jury are excessive and not sustained by the evidence.

"16. Other errors occurring at the trial and in the judgment."

We do not believe it necessary to discuss in detail each of the assigned errors, but, since this matter is brought under the Federal Employers' Liability Act, our consideration of the problem posed by these assignments of error must be controlled by the interpretation of such act by the Supreme Court of the United States. *Dice* v. *Akron, Canton & Youngstown Rd. Co.*, 91 O. App. 239; *Dice* v. *Akron, Canton & Youngstown Rd. Co.*, 342 U. S. 359; *Harris* v. *Pennsylvania Rd. Co.*, 108 O. App. 541.

> "Under this statute [45 U. S. C. A., Sec. 51] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."
>
> *Rogers* v. *Missouri Pacific Rd. Co.*, 352 U. S. 500, at 506; 77 S. Ct. 443.

The usual concept of proximate causation, as we know it in the law of Ohio, is not to be applied in cases such as we have herein, which arise under the Federal Employers' Liability Act. *Rogers* v. *Missouri Pacific Rd. Co.*, *supra*; *Schulz, Admx.* v. *Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608.

With these preliminary and fundamental statements of the rules we must follow in determining the instant case, [fol. 1123] let us examine the special findings of the jury to see what they found as to the determinative issues.

The determinative issues may be briefly summarized as follows: Is there some credible evidence to support a finding of employer negligence? Did such negligence play

any part, even the slightest, in producing the "bite" suffered by Mr. Gallick?

We are required, in examining the special finding of a jury, to liberally construe the answers with a view to ascertaining the meaning of such answers. *Kelly v. Boyd Brothers Express, Inc., et al.*, 151 Ohio St. 467, 86 N. E. 2d 608; *Elio v. Akron Transportation Co.*, 147 Ohio St. 363, 71 N. E. 2d 707.

The rule announced by the Supreme Court of the United States, with reference to the effect of local practice rules, such as the interpretation of interrogatories, is found in *Arnold v. Panhandle & Santa Fe Railway Co.*, 353 U. S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840, wherein that court said that the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

There are inconsistencies in the answers to the special verdict and the interrogatories made by the jury in the instant case. They did find, however, that the Baltimore and Ohio Railroad Co. was negligent in maintaining the stagnant pool by the side of its tracks. Although the jurors stated that they could not answer the question as to Mr. Gallick being furnished a safe place to work, they did find a cause and effect relationship between the stagnant pool and the bug bite suffered by Mr. Gallick. After its affirmative answer to the proximate causal relationship be- [fol. 1124] tween the stagnant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff, the jury found no reasonable probability or foreseeability of the Baltimore and Ohio to appreciate this proximate causal relationship between the stagnant water and other conditions leading to the present physical condition of Mr. Gallick.

Are such findings of the jury sufficient to sustain the judgment? It is difficult to reconcile the several pronouncements of the Supreme Court of the United States with reference to the application of the Federal Employers' Liability Act. A liberal attitude on the part of the court majority is apparent, but an adherence to fixed principles is not readily discernible. 69 *Harvard Review* 1441.

In many of the cases which we have examined, the causative factor has been some tangible object owned by the railroad, even though it was only gravel or an oversized cinder in the roadbed. *Webb* v. *Illinois Central Rd. Co.*, 352 U. S. 512, 1 L. Ed. 2d 503; *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 1 L. Ed. 2d 511; *Lavender, Admr.* v. *Kurn, et al.*, 327 U. S. 645, 90 L. Ed. 916.

In the instant case, as well as in *Scutilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 4 L. Ed. 2d 142; *Schulz, Admx.* v. *Pennsylvania Rd. Co.*, 350 U. S. 523, 100 L. Ed. 668; and *Inman* v. *Baltimore & Ohio Rd. Co.*, 361 U. S. 138, 4 L. Ed. 2d 198, that which caused the injury was an outside force, such as an unusual wave, ice on a boat, or a third person.

Through all these cases there runs the underlying general principle that, before a plaintiff may recover dam- [fol. 1125] ages, there must be proof of some causal relationship between the employer negligence and the injury or death of the workman.

In *Tennant, Admx.* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 88 L. Ed. 520, the court said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 US 54, 67, 87 L. ed. 610, 617, 63 S. Ct. 444, 143 ALR 967.
>
> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked,' Galloway v. United States, 319 US 372, 395, 87 L. ed. 1458, 1473, 63 S. Ct. 1077; Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 74 L. ed. 896, 50 S. Ct. 281."

In the recent case of *Inman* v. *Baltimore & Ohio Rd. Co.*, 361 U. S. 138, 4 L. Ed. 2d 198, the court, after citing with approval the case of *Rogers* v. *Missouri Pacific Rd. Co.*, 352 U. S. 500, 1 L. Ed. 493, said: "The Act does not make the employer an insurer."

In the *Rogers* v. *Missouri Pacific Rd. Co.* case, *supra*, there is an apparent reversal by the court of its position stated in *Tennant, Admx.* v. *Peoria Pekin Union Ry. Co.*, *supra*, and quoted above, wherein a "proximate cause in whole or in part" is necessary before recovery by an in- [fol. 1126] jured employee of the railroad. In the *Rogers* v. *Missouri Pacific Rd. Co.* case, the court, after rejecting the rule of proximate causation, said, with regard to this question:

> " • • • That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.
>
> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to negligence. (Emphasis added.)
>
> "The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with

the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence.

"The employer is stripped of his common-law defenses and for practical purposes the inquiry in these [fol. 1127] cases today rarely presents more than the single question, whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

We do know by overwhelming testimony that the pool of stagnant, vermin-infested water was alongside the Baltimore and Ohio tracks for many years prior to the alleged "bite" suffered by Mr. Gallick. We know, by definite evidence, that insects were in and about this stagnant pool. There is a conflict in the testimony (resolved against Baltimore and Ohio) as to whether any insect of the size described by the injured employee might infest this pool, and which insect might "bite" a man.

We have sufficient credible evidence to conclude, as did the jury, that Mr. Gallick suffered a "bite" on railroad property by some insect while working for that railroad. We have an abundance of testimony that from such "bite" severe consequences to Mr. Gallick have ensued.

We can, with reason, say that, to maintain for a period of years a stagnant, vermin-infested pool of water on and over which insects gather, on property where its employees are required to work, could furnish the gravamen of an offense under the Federal Employers' Liability Act.

No similar "bite" or other insect bites were ever complained about, although complaint about the general unsanitary condition at the location of the pool was made to the railroad.

[fol. 1128] Throughout all the cases involving employer liability, in cases such as we have before us, the United States Supreme Court has held that a right to recover is established if, from the facts proved, negligence and its

causal relationship to the injury and damage may reasonably be inferred; a jury question is presented if, with reason, "the conclusion may be drawn that negligence of the employer played any part at all in the injury."

From the facts heretofore set forth, it is obvious that the plaintiff's case, if it is to be sustained, must rest upon inferences to be drawn from the evidence. There is no direct evidence that the existence of the unidentified bug at the time and place had any connection with the stagnant and infested pool.

We observe that proof is the effect of evidence—the establishment of a fact by evidence—and in litigation there may be evidence which does not amount to proof. When there is neither direct evidence, nor reasonable inferences to be drawn from evidence, whether direct or circumstantial, a conclusion based upon such absence of evidence or reasonable inference is mere conjecture, and the drawing of a further inference from conjecture does not amount to proof. In proving a defendant's culpability, the proof must show that the tort is distinctly traceable as one of the efficient antecedents of the damages, and has a share in subjecting plaintiff to injury.

The observation made above refers only to legal cause. We are not here concerned with cause in the so-called "philosophic sense," for the reason that the causes of causes are infinite.

[fol. 1129] If the plaintiff's case is to be sustained, we must infer that this undescribed (except as to size and biting qualities) insect or bug had been attracted to the area in which the plaintiff was hurt by the stagnant pool, and that its bite caused the plaintiff's condition; that the pool created conditions and influences which helped to incubate or furnish an environment for the bug, whose bite was poisonous to the plaintiff; or, that the insect, having traveled from other areas, became contaminated or infected by the pool with a substance injurious to man, and that this substance infected the plaintiff when bitten.

The law is plain that, before the question of causation can be submitted to a jury, the trial judge must decide a preliminary question—*i.e.*, whether from the evidence a jury could reasonably find the existence of a causal

relation. If the judge decides in the affirmative, it will then be for the jury to say whether they do find. In other words, the judge must say whether on the evidence, a causal relation may be reasonably inferred. If the judge rules that it may be so inferred, the jurors then must say whether, from the evidence, the causal relation is inferred by them.

The question of causation should not get to the jury, and the judge should direct a verdict for the defendant, unless the court is of the opinion that a jury can reasonably find that the defendant's tort was an efficient cause of the damage to the plaintiff *and not a mere antecedent fact.*

As we view the record before us, we have a chain of possibilities that the negligence of the defendant might have shared in subjecting the plaintiff to damage and injury, but the proof of a legal causal connection between the negligence and the damage falls short of that required for the consideration of a jury.

[fol. 1130] Whether the insect causing the damage had any connection with the pool of stagnant water on the defendant's premises, or whether it came from the nearby putrid mouth of the Cuyahoga River, or from weeds, or unsanitary places situated on property not owned or controlled by the railroad, presents only a series of guesses and speculations, which speculations make a chain of causation too tenuous to support a conclusion of liability on the part of the railroad.

We determine, therefore, that, where there is, as here, only a guess or speculation of a causal connection between the negligence of the employer and the injury of an employee, no liability attaches, and a judgment based upon such speculation cannot be sustained.

All other claimed errors have been examined, and we find none prejudicial to the rights of the appellant.

The judgment herein is reversed as contrary to law, and final judgment will be entered for the railroad-appellant.

Reversed and final judgment for the appellant.

Doyle, P.J., and Griffith, J., concur.

(Doyle, P.J., and Hunsicker, J., of the Ninth District, and Griffith, J., of the Seventh District, sitting by designation in the Eighth District.)

[fol. 1131]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT

State of Ohio,
Cuyahoga County, ss.

C.P. 697,202

No. 25,087

No. 25,017

JAMES GALLICK, Appellee,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

JOURNAL ENTRY OF JUDGMENT—Filed April 11, 1961

This day this cause, having been previously consolidated with case No. 25,017, came on to be heard upon appeal on questions of law, assignments of error, bill of exceptions, pleadings, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, Ohio, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the appellant, in that the Court of Common Pleas erred:

(1) In overruling appellant's motion for a directed verdict at the close of all the evidence.

(2) In overruling appellant's motion for judgment notwithstanding the verdict.

and in that said Court entered judgment for appellee when such judgment should have been entered for the appellant.

It is therefore considered, ordered, and adjudged by this Court that the judgment of the Court of Common Pleas of Cuyahoga County be and the same is hereby reversed and held for naught. And the Court coming now to render [fol. 1132] the judgment which the Court of Common Pleas of Cuyahoga County ought to have rendered, final judgment is now entered in this Court for the appellant.

It is further ordered that this cause be remanded to the Court of Common Pleas of Cuyahoga County, Ohio, to carry this judgment into effect and for execution; and that the appellant recover from the appellee its costs herein expended, taxed at $..... To all of which, appellee, by counsel, excepts.

All other claimed errors have been examined, and this Court finds none prejudicial to the rights of the appellant. To which appellant, by counsel, excepts.

Ordered, that a special mandate be sent to said Court of Common Pleas to carry this judgment into execution.

Arthur W. Doyle, Presiding Judge, Lynn B. Griffith, Judge, Oscar Hunsicker, Judge.

(Doyle, P.J., and Hunsicker, J., of the Ninth District, and Griffith, J., of the Seventh District, sitting by assignment in the Eighth District.)

[File endorsement omitted]

[fol. 1133]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT OF OHIO

CUYAHOGA COUNTY

Case No. 25087 Consolidated
With Case No. 25017

JAMES GALLICK, Plaintiff-Appellant,

—vs—

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

NOTICE OF APPEAL—Filed April 15, 1961

Now comes the above named appellant, James Gallick, and hereby gives notice of this his appeal to the Supreme Court of Ohio, from the judgment and final order rendered by the Court of Appeals of Cuyahoga County, Ohio, on the 11th day of April, 1961.

This appeal is on questions of law and is taken on condition that a Motion to Certify be allowed by the Supreme Court of Ohio, and, further, because the case involves constitutional questions under the Constitution of the State of Ohio and the Constitution of the United States.

A. H. Dudnik, M. I. Nurenberg, 714 Engineers Building, Cleveland 14, Ohio, Main 1-2300, Meyer Cook, Hanna Building, Cleveland, Ohio, Tower 1-5484, Attorneys for Plaintiff-Appellant.

[fol. 1134] Notice of Service (omitted in printing).

[fol. 1135]

IN THE SUPREME COURT OF OHIO

JAMES GALLICK, Plaintiff-Appellant,

—vs—

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant-Appellee.

MOTION TO CERTIFY

Plaintiff-appellant herein, James Gallick, respectfully moves this honorable Court for an order directing that the Court of Appeals for the County of Cuyahoga, Ohio, certify its record to this Court, for hearing and decision, in the above entitled action, which is Case No. 25087 consolidated with Case No. 25017 on the docket of said Court of Appeals.

Appellant further states that the final order and judgment of said Court of Appeals was rendered on the 11th day of April, 1961, and the appellant herein has filed in said Court of Appeals a Notice of Appeal on the 15th day of April, 1961, a copy of which Notice of Appeal is appended hereto, all as required by law, showing notice of service of said notice upon counsel of record for the defendant and upon said Court of Appeals.

[fol. 1136] Appellant further states that said judgment of the Court of Appeals reversed a judgment entered in favor of the appellant herein by the Common Pleas Court of Cuyahoga County in the sum of Six Hundred Twenty-five Thousand Dollars ($625,000.00) with the costs of this action.

Appellant further states that this case is one of public and great general interest, as will more fully appear from briefs to be filed in support of this Motion, and that there was error in the judgment and proceedings of the Court of Appeals, prejudicial to the rights of this appellant.

A. H. Dudnik, M. I. Nurenberg, 714 Engineers Building, Cleveland 14, Ohio, Main 1-2300, Meyer Cook, Hanna Building, Cleveland, Ohio, Tower 1-5484, Attorneys for Plaintiff-Appellant.

[fol. 1137] Notice of Service (omitted in printing).

[fol. 1138]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT OF OHIO

CUYAHOGA COUNTY

No. 25087, Consolidated With Case No. 25017

JAMES GALLICK, Plaintiff-Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

NOTICE OF CROSS-APPEAL TO THE SUPREME COURT—
Filed April 25, 1961

Appellee hereby gives notice of its cross-appeal to the Supreme Court of Ohio from the judgment and final order rendered and entered herein on the 11th day of April, 1961.

This cross-appeal is taken to the Supreme Court on condition that a motion to certify be allowed by that court.

Baker, Hostetler & Patterson, 1956 Union Commerce Building, Cleveland 14, Ohio, MAin 1-0200, Attorneys for Defendant-Appellee.

Notice of Service (omitted in printing).

[fol. 1139] Notice of Service upon the Court of Appeals (omitted in printing).

[fol. 1140]

IN THE SUPREME COURT OF OHIO

JAMES GALLICK, Plaintiff-Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant-Appellee.

MOTION TO CERTIFY RECORD

Now comes The Baltimore and Ohio Railroad Company, appellee, and moves the Court for an order directing the Court of Appeals of Cuyahoga County, Ohio, to certify its record in the cause set forth in the Notice of Cross-Appeal attached hereto, for the reason that this case is one of general and great public interest, as will appear more fully in the brief to be filed by the appellee herein, and that there was error in the judgment and proceeding of the Court of Appeals prejudicial to the rights of appellee.

Appellee states that it has filed in said Court of Appeals a Notice of Cross-Appeal, a copy of which is appended hereto.

Baker, Hostetler & Patterson, 1956 Union Commerce Building, Cleveland 14, Ohio, MAin 1-0200, Attorneys for Defendant-Appellee.

[fol. 1141] Notice of Service (omitted in printing).

[fol. 1142]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT OF OHIO

ASSIGNMENTS OF ERROR

Plaintiff respectfully contends that the Court of Appeals in rendering final judgment for the defendant, thereby reversing the judgment of the Court of Common Pleas

entered upon a special verdict of the jury, erred to the prejudice of plaintiff in the following respects:

A. Said judgment is contrary to the Constitutions of the United States, the State of Ohio and the Laws of the United States, particularly the Federal Employers' Liability Act, 45 USCA, Sections 51 through 60.

B. The Court of Appeals substituted its judgment in weighing the evidence for that of the jury, contrary to the decisions of the United States Supreme Court construing the Federal Employers' Liability Act.

C. The Court of Appeals erred in finding an insufficiency of evidence that the bug which bit plaintiff came from the negligently maintained stagnant pool and became infected there and was attracted to said pool by the conditions maintained there by defendant, when in fact there was a sufficiency of evidence in the Record on this point.

D. The Court of Appeals erred in determining that the Trial Judge should have directed a verdict for the defendant at the conclusion of the evidence.

E. The Court of Appeals erred in determining that a finding of a causal connection between the negligence of the defendant and the injury to plaintiff would of necessity be based on only guess or speculation when there was a sufficiency of evidence to permit a reasonable inference of said causal connection.

[fol. 1143] F. The Court of Appeals erred in determining that unless the jury could reasonably find that the defendant's tort (i.e., negligence) was an efficient cause of the damage to the plaintiff, the Judge must direct a verdict for the defendant, as such a standard of causal connection is contrary to the decisions of the United States Supreme Court under the Federal Employers Liability Act.

[fol. 1144]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT OF OHIO

CROSS-ASSIGNMENTS OF ERROR

Appellee says that there was error prejudicial to this appellee in the judgment and final order of the Court of Appeals, in that the Court of Appeals overruled all of the appellee's assignments of error to that court, among which were the following:

I. The trial court erred in the impaneling of the jury.

II. The trial court erred in admitting certain evidence offered by the appellant and objected to by the appellee.

III. The trial court erred in refusing to give certain special charges submitted by appellee.

IV. The trial court erred in giving certain special charges submitted by appellant and objected to by appellee.

V. The trial court erred in its general charge to the jury.

VI. The trial court erred in refusing certain special interrogatories submitted by appellee.

VII. The trial court erred in submitting a special verdict which denied to appellee its rights under federal law, and which was legally improper and incomplete under Ohio law.

VIII. The trial court erred in entering judgment for appellant upon the special verdict.

IX. The trial court erred in not entering judgment for the appellee upon the special verdict.

X. The amount of damages assessed by the jury is excessive, is not sustained by the evidence, and appears to have been given under the influence of passion and prejudice.

XI. Other errors manifest on the face of the record.

[fol. 1145]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT

STATEMENT OF QUESTIONS PRESENTED

1. Is an order directing a verdict for the defendant because the proof of causal connection fails to rise above the level of "speculation and conjecture" a denial of plaintiff's constitutional guarantee of trial by jury under the Federal Employers' Liability Act, 45 U. S. C. A. 51?

2. Has the Court of Appeals the jurisdictional power to remove the instant cause from the jury by weighing the evidence and finding it insufficient on the issue of legal causation?

3. Where there is some evidence in the record for the jury to infer legal causation between the defendant's negligence and the plaintiff's injury, may the Court of Appeals determine, as a matter of law that such evidence is not "proof" but merely "speculation and conjecture" and thereby remove this cause from the consideration of the jury?

4. Did the Court of Appeals apply a proper standard to determine the requirements of legal causation in this action under the Federal Employers' Liability Act, 45 U. S. C. A. 51, in requiring proof of an "efficient" cause?

[fol. 1146]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT

THE CONSTITUTIONAL QUESTION

The controlling constitutional authority for the Federal Employers' Liability Act is, of course, Article I, Section 8 of the Constitution of the United States, vesting exclusively in the Congress of the United States the power to regulate commerce among the several states. Inasmuch as defendant has conceded that at the times plaintiff was working

for the railroad, plaintiff was engaged in Interstate Commerce, he clearly comes within the protective powers of this Section of the Constitution of the United States. As shall be demonstrated hereafter under the Argument and law in support of this Brief, this Section of the Constitution of the United States has in effect been construed by the Supreme Court of the United States to be in *pari materia* of Amendment VII of the Bill of Rights preserving the right of trial by jury. To the same effect is Article I, Section 5 of the Bill of Rights of the Constitution of the State of Ohio.

[fol. 1147]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT

THE MATTER OF PUBLIC OR GREAT GENERAL INTEREST

While there have been many decisions of the United States Supreme Court and of the Appellate Courts of this State delineating the standards or tests of *what constitutes* legal causation in an action brought under the Federal Employers' Liability Act, Section 51, there has as yet been no interpretation by this Court as to the *sufficiency of proof* required to sustain that specific issue in an action brought under the Act. Likewise there has been no construction by this Court of the relative functions of Court and jury, particularly Appellate Court jurisdiction, to pass upon the specific issue of sufficiency of the evidence to establish legal causation, as distinguished from the power to pass upon the sufficiency of the evidence to prove negligence.

Section 51 of the Act refers to injury "resulting in whole or in part" from the negligence of the carrier. The word "negligence" as used in Section 51 is not defined by the Statute and therefore, of course, would take its common law definition. However, the phrase "resulting *in part* from the negligence" has no counterpart in common law jurisprudence. The Court of Appeals in the instant case apparently applied common law standards on the question of sufficiency of proof to establish causal con-

nection. We believe that the question of whether or not the common law standards of sufficiency of proof on the issue of causal connection, as distinguished from the issue of negligence, and the power of Appellate Court review of the jury's findings pertaining to this question, requires clarification by this Court.

[fol. 1148]

IN THE SUPREME COURT OF OHIO

Case No. 37218

JAMES GALLICK, Plaintiff-Appellant,

v.

BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

Date Memoranda of Pleadings, &c., Filed, Writs Issued, &c., Judgments, Orders and Decrees

* * * * * * *

Journal 44, Page 454
Motion for an Order Directing the Court of Appeals for Cuyahoga County to Certify Its Record

It is ordered by the Court that this motion is overruled.

Journal 44, Page 454
Cross Motion for an Order Directing the Court of Appeals for Cuyahoga County to Certify Its Record

It is ordered by the Court that this motion is overruled.

Journal 44, Page 454
Motion by Appellee to Dismiss Appeal as of Right. Cuyahoga County.

It is ordered by the Court that this motion is sustained.

Journal 44, Page 458
Appeal From the Court of Appeals for Cuyahoga County.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner

prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the defendant-appellee recover from the plaintiff-appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

[fol. 1149] [File endorsement omitted]

[fol. 1150]

No. 37218

IN THE SUPREME COURT OF OHIO

Appeal From
The Court of Appeals of Cuyahoga County

JAMES GALLICK, Plaintiff-Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

APPLICATION OF DEFENDANT-APPELLEE FOR RE-HEARING OF ITS CROSS-MOTION TO CERTIFY—Filed December 14, 1961

Defendant-appellee, The Baltimore and Ohio Railroad Company, hereby applies for a re-hearing of its Cross-Motion to Certify on the grounds and for the reason that the record herein presents numerous questions not passed upon by the Court of Appeals, some of which, if decided in favor of defendant-appellee, would provide grounds in addi-

tion to and independent of those stated by the Court of Appeals for the entry of final judgment in favor of defendant-appellee. Other such questions, if so decided, would require an alternative order for a new trial in the event the present judgment of the Court of Appeals should be reversed.

The questions referred to include, but are not limited to: (1) whether the special verdict of the jury, including its finding that there was no reason for defendant-appellee to anticipate that its alleged negligence "would or might probably result in a mishap or an injury," legally requires the entry of final judgment for defendant-appellee, or would legally permit entry of final judgment for plaintiff-appellant; (2) whether the trial court erred in permitting plain-
[fol. 1151] tiff-appellant's expert medical witnesses to answer the hypothetical question addressed to them, in the absence of which there would be no proof in the record whatsoever of causal connection; (3) whether the trial court erred in permitting employees of defendant-appellee to be called for cross-examination by plaintiff-appellant under Ohio Revised Code §2317.52; (4) whether the amount of damages found by the jury in its special verdict was grossly excessive; and (5) other substantive and procedural questions affecting defendant-appellee's constitutional right to a fair and impartial trial.

Defendant-appellee says that since the announcement of this Court's decision on December 7, 1961, counsel for plaintiff-appellant has filed notice in this Court of his intention to petition the United States Supreme Court for a writ of certiorari herein, pursuant to which the case may be heard upon the merits by that Court; that in the event of a reversal by the United States Supreme Court and the entry of final judgment for plaintiff, defendant will have been denied its legal right to have all of the foregoing questions determined by an appellate court of the State of Ohio; and that said questions involve matters of Ohio law which are of great and general public interest and importance and upon which the United States Supreme Court is powerless to rule.

Respectfully submitted.

Russell E. Leasure, Alexander H. Hadden, Baker, Hostetler & Patterson, Attorneys for Defendant-Appellee.

[fol. 1152]

IN THE SUPREME COURT OF OHIO

Journal 44, Page 511

Application for Rehearing

Upon consideration of the application for rehearing, it is ordered that rehearing is denied.

[fol. 1153] [File endorsement omitted]

No. 37218

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals of Cuyahoga County, Eighth Judicial District of Ohio.

JAMES GALLICK, Plaintiff-Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant-Appellee.

NOTICE OF APPEAL—Filed January 25, 1962

Now comes the above named appellant, James Gallick, and hereby gives notice of his appeal to the Supreme Court of the United States from the judgment and orders of the Supreme Court of Ohio denying the motion of appellant herein to certify the record and judgment of the Court of Appeals of Cuyahoga County and dismissing the appeal of appellant on constitutional questions on the order of the Supreme Court of Ohio that no debatable constitutional question was involved.

Said appeal of appellant herein involves questions concerning the Constitution of the United States of America and is taken on condition that a petition for writ of certio-

rari be granted by the Supreme Court of the United States on questions of law.

A. H. Dudnik, M. I. Nurenberg, 714 Engineers Building, Cleveland 14, Ohio, Meyer Cook, Hanna Building, Cleveland, Ohio, Attorneys for Plaintiff-Appellant.

[fol. 1154] Notice of Service (omitted in printing.)

[fol. 1155]

SUPREME COURT OF THE UNITED STATES

No. 765—October Term, 1961

JAMES GALLICK, Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—April 16, 1962

The petition herein for a writ of certiorari to the Court of Appeals of the State of Ohio, Cuyahoga County, is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter and Mr. Justice White took no part in the consideration or decision of this application.

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FILED
MAR 3 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 1176

JAMES GALLICK,
Petitioner;

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Cuyahoga County, Ohio, Eighth Judicial District of Ohio.

A. H. DUDNIK,
MARSHALL I. NURENBERG,
714 Engineers Bldg.,
Cleveland 14, Ohio,
Attorneys for Petitioner.

MEYER A. COOK,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Cuyahoga County, Ohio, Eighth Judicial District of Ohio.

OPINIONS BY COURTS BELOW.

Petitioner, James Gallick, respectfully prays that a writ of certiorari issue to the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, to review the judgment and decision of that Court in Cases Nos. 25017 and 25087 consolidated, entitled *James Gallick v. The Baltimore and Ohio Railroad Co.* The decision of the Court of Appeals dated March 23, 1961, is reported in 86 Oh. L. Abs. 1, 176 N. E. 2d 382 (1961), which opinion of the Court of Appeals is appended hereto as Appendix A. The judgment journal entry of the Court of Appeals dated April 11, 1961, is appended hereto as Appendix B. The judgment of the Court of Appeals reversed a judgment in favor of the petitioner herein which had been entered in his favor in the sum of Six Hundred Twenty-five Thousand Dollars ($625,000.00) upon the special verdict of the jury by the Court of Common Pleas of Cuya-

hoga County. The journal entry of judgment in favor of petitioner by the Court of Common Pleas of Cuyahoga County, which incorporates as part of said journal entry the special verdict of the jury, is appended hereto as Appendix C. The judgment of the Court of Appeals which reversed the judgment of the Court of Common Pleas in favor of petitioner and instead entered final judgment for respondent was bottomed on the single proposition that petitioner's proofs of causal connection fell short of the degree of proof on that issue required by law, hence the trial court erred in not directing a verdict at the conclusion of all of the evidence in favor of respondent, or in the alternative in entering judgment for respondent notwithstanding the verdict.

Petitioner thereupon sought a review of the cause by means of a motion to the Supreme Court of Ohio to direct the Court of Appeals to certify its record to the Supreme Court of Ohio for review, and also seeking a review on Constitutional questions under the Constitution of the State of Ohio and of the United States pertaining to the right of petitioner to a trial by jury in an action brought under the Federal Employers' Liability Act. The jurisdiction of the Supreme Court of Ohio to review the case is found under Article IV, Section 2, Constitution of the State of Ohio. Under these provisions of the Constitution of the State of Ohio, petitioner had no appeal as a matter of right to the Ohio Supreme Court. Review by that Court is discretionary upon the ground that the case is one "Of public or great general interest," or that a debatable constitutional question is involved. The review sought by petitioner raising questions of public or great general interest and constitutional questions was denied by the Ohio Supreme Court. At the same time, respondent likewise sought a review by the Ohio Supreme Court of

the judgment of the Court of Appeals for Cuyahoga County by means of a cross-motion to certify, likewise claiming questions of public or great general interest. The Supreme Court of Ohio, however, refused to take jurisdiction of the cause and issued orders overruling the motion to certify of petitioner, the cross-motion to certify of respondent, and determined that no debatable constitutional question was presented by the judgment of the Court of Appeals. Respondent thereupon filed a motion for a re-hearing on its cross-motion to certify, which motion was denied. Thus, all remedies available through the state judicial system of the State of Ohio have been exhausted by petitioner. The various orders of the Supreme Court of Ohio refusing to take jurisdiction of the case are appended hereto as Appendix D.

Under the Law of Ohio, therefore, the judgment of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, becomes the final judgment of the highest court of the State of Ohio in which a decision can be had. *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 37 S. Ct. 653.

JURISDICTION OF THIS COURT.

Jurisdiction of this Court to review the said judgment of the Court of Appeals for Cuyahoga County and to review the constitutional questions raised by petitioner are conferred upon this Court by the Act of June 25, 1947, c. 646, 62 Stat., 929, Title 28, U. S. C. Section 1257. The portions of that section pertinent to jurisdiction of this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or statutes * * * the United States."

QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act was the Court of Appeals correct in holding that the proofs of petitioner on the issue of causal connection failed to rise above the level of "speculation and conjecture" when tested by the quantum of proof prescribed by this Court to justify submission of the cause to the jury?

2. By its order of judgment directing a verdict for respondent for the sole reason that the proofs of petitioner on the issue of causal connection failed to rise above the level of "speculation and conjecture," did the Court of Appeals thereupon deny petitioner his constitutional guarantee of trial by jury under the Federal Employers' Liability Act, 45 U. S. C. A., 51?

3. Was the invocation of jurisdictional power by the Court of Appeals to weigh the evidence and thereupon substitute its finding for that of the jury on the issue of legal causation an unlawful exercise by the Court of Appeals of jurisdictional power under the doctrines of appellate review pronounced by this Court in actions brought under the Federal Employers' Liability Act, 45 U. S. C. A., 51?

4. Where an examination of the transcript of testimony in its entirety discloses circumstantial evidence from which the jury could infer the necessary legal causation between respondent's negligence and petitioner's injury, may the Court of Appeals determine as a matter of law

that such evidence is not "proof," but merely "speculation and conjecture," and thereby enter judgment for the respondent as a matter of law after the jury had found for petitioner and judgment upon the verdict of the jury had been entered for petitioner?

5. In an action under the Federal Employers' Liability Act, was the Court of Appeals correct in applying as a legal standard to determine legal causation in an action under the Federal Employers' Liability Act, 45 U. S. C. A., 51, proof of an "efficient" cause?

6. In this action under the Federal Employers' Liability Act, where petitioner adduced proof that his injuries were the result of an insect bite from an insect which could have come from the unsanitary pool of water complained of, was petitioner required to adduce proof that the insect did not come from other sources for which respondent was not liable?

7. In this action under the Federal Employers' Liability Act, were the special findings by the jury of negligence and causal connection supported by credible evidence when correctly tested by principles governing judicial review set forth by this Court?

8. In an action under the Federal Employers' Liability Act, where the jury, in response to specific inquiries submitted to it as a special verdict, found particular acts and omissions of the respondent which in the opinion of the jury consisted negligence, and the jury found a proximate causal relationship between the conditions constituting negligence and the injury to the petitioner, may the reviewing Court of Appeals thereupon set aside a judgment in favor of petitioner entered upon said special verdict for alleged insufficiency of evidence where there is credible evidence in the record to support the findings of the jury?

9. Where the Court of Appeals in its Opinion concedes that by overwhelming testimony the pool of stagnant, vermin-infested water, alongside the tracks of respondent for many years prior to the bite suffered by petitioner contained insects in and about said stagnant pool and that insects of the size described by the injured petitioner might infest said pool and bite a man and that petitioner did in fact suffer a bite on respondent's premises by some insect in the course and scope of employment and from such bite severe consequences to him ensued, may the Court of Appeals thereupon, under the principles of judicial review pronounced by this Court, find prejudicial error to the rights of respondent in submitting said cause to the consideration of the jury on the sole ground that whether the insect causing the damage had any connection with the pool of stagnant water on respondent's premises, or whether it came from other sources on property not owned or controlled by respondent, presented only a series of "guesses and speculations" making a chain of causation "too tenuous" to support a conclusion of liability on the part of respondent.

STATUTES INVOLVED.

The federal statutes involved in this review are those of the Federal Employers' Liability Act, particularly Section 1 thereof (Title 45, U. S. C., Section 51).

Jurisdiction of the federal claim by the state court is provided in Section 6 of the Federal Employers' Liability Act (Title 45, U. S. C. Section 56).

The following statutes of the State of Ohio will aid in an understanding of some of the issues in this appeal: Ohio Revised Code, Section 2315.15, providing for the submission of determinative issues to the jury in a special verdict; Ohio Revised Code, Section 2315.16, providing for the

testing of a special verdict by special interrogatories; and Ohio Revised Code, Section 2315.17 for the rendering of a judgment where a special verdict is tested by interrogatories.

The foregoing federal and state statutes are appended to this petition as Appendix E.

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against respondent railroad, defendant below, in the Court of Common Pleas of Cuyahoga County, Ohio. The petition after the necessary allegations to invoke the applicability of the Federal Employers' Liability Act, alleged negligence in that defendant knew that by permitting a pool of stagnant water on its premises at Lime Road and the Columbus Road Bridge in Cleveland, Ohio, to accumulate dead pigeons, rats, bugs and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions. Plaintiff further alleged that by reason of such negligence and as a direct and proximate result thereof, he was caused to be bitten by an insect while working in and about said pool of stagnant water in the performance of his employment duties which caused his system to become poisoned and which resulted in the formation of deep, acute ulcerations with draining about his extremities and body, which injuries have necessitated surgery for the amputation of both of his legs, that he is confined to his hospital bed and a wheelchair and will remain so into the indefinite future. Plaintiff alleged other injuries and permanent incapacity from earning wages, for all of which he prayed as damages the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

Defendant, by its answer, admitted that plaintiff's duties for respondent as a yard foreman and yard helper were

in furtherance of interstate commerce and that the work duties of petitioner, during the time alleged, specifically the month of August, 1954, caused him to be present from time to time at or near tracks of respondent located in the vicinity of Lime Road and the Columbus Road Bridge, where the alleged injury occurred. Respondent thereupon pled in its answer to the amended petition certain affirmative defenses which were denied by a reply. The pleadings on which the issues were joined, specifically the amended petition of petitioner, respondent's answer and the reply of petitioner, are all appended hereto. Appendix F.

As already indicated, the trial court submitted certain specific issues to the jury as alleged determinative issues under the special verdict statute of the State of Ohio, Ohio Revised Code, Section 2315.15. Upon consideration of the jury's answers to said determinative issues, the trial court thereupon entered judgment in favor of petitioner. Subsequently, various motions of respondent for judgment on the special verdict, a new trial, or judgment in its favor notwithstanding the verdict of the jury, were overruled by the trial court.

It is important to note that the Court of Appeals in its review of the cause specifically found no error under the laws of the State of Ohio in the admission or exclusion of evidence; the charges of law submitted to the jury; the form of the special verdict or the answers of the jury thereto; the size of the verdict or judgment; or that the special verdict of the jury did not contain findings sufficient to support a judgment for petitioner. *It is crystal clear from the Opinion of the Court of Appeals that if that Court erred in its conclusion that under the law the evidence was insufficient to warrant submission of the cause to the jury in the first place, then in all other respects the judgment in favor of petitioner was proper.* The various

procedural claims of error asserted by respondent were specifically rejected by the Court of Appeals and by the Supreme Court of Ohio in its refusal to take jurisdiction on the cross-motion to certify of respondent and denial of the motion for rehearing of respondent. *Thus, the single issue presented is whether the proofs justify with reason the finding by the jury that respondent's negligence played some part in producing petitioner's injuries.* The Court of Appeals held as a matter of law that the proofs did not. This is the fundamental error which forms the basis for the instant petition for a writ of certiorari.

The transcript of testimony which forms the basis of the record upon which a determination of the sufficiency of the proofs must be made will now be referred to in its important aspects in support of petitioner's claim that it was error to deprive him of his judgment. Numbers as they appear in parentheses refer to page numbers in the typewritten transcript of testimony, i.e., the Bill of Exceptions as it was submitted to the Court of Appeals and to the Supreme Court of Ohio.

STATEMENT OF FACTS AND EVIDENCE.

In brief, by way of background, it may be stated that in August of 1954, while performing his usual duties as a member of a switching crew, petitioner had occasion to walk in a northerly direction under the Columbus Road Bridge in the "Flats" of Cleveland on the west side of respondent's River Track. The River Track was a single track running in part under this bridge. Respondent's right of way included the area on both sides of this track under the bridge. He stopped underneath said bridge for a period of approximately thirty to forty-five seconds to see whether his diesel switch engine was following him

up the track. Upon ascertaining that it was so doing, he took one or two steps again to the north at which time he felt the "bite" of an insect on the back of his left leg just above the knee. Upon feeling the bite he squeezed this area of his leg and felt a crack or pop. Something then rolled down his pants leg about two inches long and half inch in diameter. Opposite to where petitioner was standing, on the east side of said track, was a pool of stagnant water which contained quantities of dead pigeons, dead rats and sundry varieties of crawling and flying bugs, lice and vermin. The stagnant pool underneath the bridge was within respondent's right of way under its possession and control.

William Molnar, a brakeman of fourteen years service with the respondent, who had worked in this area on and off for several years (R. 23, R. 24), described the area as a swamp with dead pigeons, rats and insects as long as he could remember.

> "Q. Is it not a fact, Mr. Molnar, that when those rats and pigeons, the dead rats and pigeons, were lying in that ditch, there were bugs and insects around then, is that not a fact, sir?
>
> A. There is always bugs where the stagnant water was.
>
> Q. Were they there when the rats were there and the dead pigeons were there, Mr. Molnar, is that not a fact?
>
> A. Yes." (Emphasis added.)

Walter Rady, a brakeman employed by the defendant for thirty-nine years during which he worked this area on Saturday and Sunday as a relief man (R. 44) described these conditions substantially the same as Molnar.

William Clason, a yard foreman of fourteen years service, who had worked the Seneca Street job (R. 51, R. 52), corroborated these conditions and further the inadequate maintenance efforts of respondent section crew as follows:

"Q. Is it not a fact that Paul Delaria, the section foreman, had made several attempts to clear this swamp up but was never successful?

A. Yes, he did work on it to drain it.

Q. Sir, please. Read the question. You can answer that, if I have stated a fact to you you say yes, and if I haven't stated a fact you say no.

A. Yes.

Q. Is this not a fact, that the condition was bad several years ago, and was still bad in August of '54, sir?

A. Yes."

Petitioner himself had ten years of experience with respondent as a brakeman or yard foreman (R. 90). He described the conditions underneath the bridge (R. 99) as follows:

"Q. Jim, can you describe the condition underneath the bridge, particularly along the east rail as it was in August of 1954?

A. *Well, there was stagnant water, dead rats, pigeons, with insects flying above and in the water.*

Q. *Were those rats and pigeons in the water?*

A. *In the water and long the rail.*

Q. How long, if you know, had that condition which you now describe existed before August of 1954?

A. As long as I remember.

Q. Well, how long do you remember, Jim?

A. Well, the length of time that I worked for the B & O Railroad, 10 years.

Q. Was it ever cleaned up?

A. I have never seen it cleaned up.

Q. Have you ever complained about it to anyone?

A. Yes, to Paul Delaria, the track foreman.

Q. To Paul Delaria, and he is what?

A. He is the track foreman.

Q. Had you complained about that before August of 1954?

A. Yes, a long time before.

Q. Had you complained about it once or more than once?

A. More than once." (Emphasis added.)

It is clear from the testimony of respondent's section foreman, Paul Delaria, that the river track underneath the Columbus Road Bridge and the drainage of accumulated water, from the swamp area underneath the bridge on the east side of the track to a manhole south of the bridge and also east of the track, was under his jurisdiction for maintenance. This area is depicted by Exhibit 12, the blueprint prepared by Cyril W. Neff, the Civil Engineering expert called by petitioner, and Exhibit M, respondent's aerial photo. Although the Columbus Road Bridge itself is a public bridge the all-important fact is *that control of the drainage underneath the bridge was exclusively under jurisdiction of repondent's maintenance crew headed by Mr. Delaria.*

The measurements of Cyril W. Neff were the only testimony in the entire case purporting to show grade elevations of the area in question. The entire problem with regard to draining the swamp area is summarized by Mr. Neff (R. 231) as follows:

"Q. Mr. Neff, I pointed to the area underneath the bridge, that swamp area we are talking about. Is that lower than the pipe or higher, sir?

A. That area is lower than the pipe.

Q. And is that why it will not flow into the pipe, sir?

A. That is one of the reasons why it won't flow into the pipe.

Q. And could that be eliminated by the filling in of slag that you told us about?

A. Yes, sir."

From the foregoing evidence the jury was certainly justified in finding that on premises under the control of respondent there existed a pool of stagnant water into which were accumulated dead pigeons, dead rats, vermin and bugs. Petitioner was required to perform his work duties in close proximity to said area.

With regard to the unhealthful or unsanitary nature of the foregoing conditions, there is the testimony of Dr. Ippolito (R. 395) as follows:

> "This man was working near a rat-infested pool, with dead rodents in it, and bugs flying in the air. The man was bitten by an insect, and the conditions that followed thereafter. I don't know how I could assume anything else, that the causative agent was this insect bite."

Dr. Ippolito, (R. 396) gave as his professional opinion that some bacteria was introduced into this man's body at the time of the bite, and further testified as follows: (R. 401)

> "I get it from the history of the patient. The patient told me that he was bitten by an organism, by an insect, *and we do know that stagnant pools of water particularly that are infected and have rodents, rats, in them, that insects will go to that area more so than in a dry clean area.*" (Emphasis added.)

Further testimony with regard to the unsanitary and unhealthful nature of this work area is contained in a

portion of the cross examination of Dr. Robin Anderson, (R. 463) who testified as follows:

> "From this point we have our own history in terms of the record. We must carry our basic reasoning back one step further, *and that is that the presence of filth of rats, of dead vermin, of stagnant water, predisposes to disease, predisposes to the growth of insects and the like.*
>
> "This man was bitten in close proximity to such an area of stagnant filth, and it is only logical *and we must assume that the probability is there that whatever it was in the insect, in the bug, is related to the presence of that area.*" (Emphasis added.)

Further, Dr. Anderson testified as follows (R. 467):

> "I can say in terms of medical specialized knowledge, a medical, *a doctor is expected to understand principles of sanitation, and as such we know that the presence of stagnant water is traditionally a breeder of water insects, and we know that the presence of rats implies the presence—or of various insects that feed on it,* such as plague-carrying insects which is the rat flea which lives on the rat both living and dead, and it is the cause of the famous plague episodes in history. We know a certain number of facts which are specialized perhaps in the medical sense but not specialized for an entomologist or an insect expert." (Emphasis added.)

As already noted, the incident occurred after petitioner had been standing for thirty to forty-five seconds a track width opposite the cesspool which contained the filthy conditions already referred to in the performance of his work duties. He then turned around and took a step or two to the north when he felt this bite and cracked or popped what had the feel of a hardshelled insect.

Thus, petitioner (R. 111) testified that he felt pain which was severe in the beginning and that when he

climbed on the footboard of the diesel, he showed it to one of his fellow crew members. When he finished his tour of duty, he had a sensation above the knee on the back of his thigh and washed the area at his locker with soap, a washrag and water (R. 112). When he arrived home at 11:00 o'clock P. M., he was still conscious of the sensation and had his wife look at the rear (R. 113). The area never cleared up and after four or five days, formed a boil (R. 114). The boil burst in the bathtub following which he went to his family doctor, Dr. Heller (R. 114, R. 115). The Marymount Hospital records introduced into evidence and other testimony prove that from this original site the first ulceration developed. This was, of course, corroborated by the petitioner himself.

Mary Gallick, the wife of petitioner, testified that on the night in question, she saw a welt just like when you get a bite which was pink in color and about the size of her nail. The following morning (R. 65), it got deeper in color, a deeper pink. By the fifth day it was larger and real pink and began to raise (R. 66). By the time petitioner went to Dr. Ippolito, the area in question was described by Mrs. Gallick as follows:

> "By that time it was about the size of a half a dollar and it had raised and it had been draining on the side, and it looked very ugly." (R. 67)

Without further encumbering this petition with factual recitations, it is undisputed that when this original lesion failed to heal with conservative treatment, petitioner was hospitalized at Marymount Hospital whereupon a skin graft was instituted and it was only following the initial skin graft that the skin surfaces on both legs began to break down and form ulcerations which thereupon spread to other parts of his body. During this entire

period of time, petitioner was under constant surveillance of trained medical technicians and physicians with daily progress notes recording his confinement at Marymount Hospital and the Cleveland Clinic. These records, which were introduced into evidence, Exhibits 13, 14, 15, 16, 17 and 18, disclose a steady course of disability and debilitation, all stemming from the original lesion. *It is significant to note that the final diagnosis of the Marymount Hospital records recorded after almost two years of continuous hospitalization was "pyodermagangrenosa, secondary to insect bite."*

Respondent's own medical expert, Dr. Davis, testified as follows (R. 742, R. 743):

"Q. *Doctor, is a bite or sting from a bug a trauma?*

A. *Yes.*

Q. What is the meaning of the word trauma?

A. I believe it means an injury.

Q. What is the meaning of the term local trauma?

A. Local trauma means that it happened in a locality of the body rather than to the whole body.

Q. An isolated area.

A. Isolated area.

Q. *Is pyoderma used sometimes instead of pyoderma-gangrenosa?*

A. *Yes, it can be. They do not mean quite the same but they are used together.*

Q. *Do you have an opinion as to whether pyoderma can be caused by trauma?*

A. *Yes, I think it can.*

Q. *Is it one of the recognized causes of pyodermagangrenosa?*

A. *Well, yes, I think it is fair to say it would be a recognized cause."* (Emphasis added.)

It must be emphasized from the foregoing that it was only in the area in and about the Columbus Road Bridge, particularly where the pool of stagnant water was main-

tained, that insects of the approximate size and character which bit petitioner were observed (R. 255, R. 257). No witness testified to having observed similar insects in any other area. We believe that this evidence as herein set forth, under the law, as will be analyzed hereinafter, entitled the jury to make the inference which it did as to a causal connection between the stagnant pool of water, the bugs, the bite which plaintiff sustained and his illness. In this connection again it must be emphasized that both of his treating physicians who testified, i.e., Doctors Ippolito and Anderson, surgeons of unquestioned reputation and qualification, testified that the described conditions were the most likely source of the disease process which infected petitioner and that as physicians it was necessary for them to be familiar with problems of sanitation which would include the problems of disease process bred by dead, putrid animal matter of the type herein described, with insects seen crawling and flying in and about this matter.

ARGUMENT.

Summary.

This petition seeks to correct fundamental errors in the very nature and method of the judicial review indulged in by the Court of Appeals in an action under the Federal Employers' Liability Act, which fundamental errors the Supreme Court of Ohio refused to review, thereby reducing the judgment of the Court of Appeals to a final judgment.

Respondent had sought review from the Court of Appeals of Cuyahoga County upon the judgment in favor of petitioner entered by the trial court and had alleged for the consideration of the Court of Appeals sixteen grounds of error. Most of these grounds concern themselves with

procedural questions particularly, evidentiary questions, instructions of law, the findings of the jury on the special verdict, the amount of damages assessed by the jury, and other issues of trial procedure. All of these alleged grounds of error were carefully considered by the Court of Appeals and as stated in the language of the Court of Appeals, "All other claimed errors have been examined, and we find none prejudicial to the rights of the appellant." The Court of Appeals carefully limited its judgment of reversal to the narrow ground of an insufficiency of evidence from the proofs on the issue of causal connection.

Questions 2, 3, 6, 8.

One of the early fundamental cases in which this Court held that trial by jury is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act was *Bailey v. Central Vermont Railway Co.*, 319 U. S. 350, 63 S. Ct. 1062 (1943). The *Bailey* case certainly did not prohibit Appellate Court supervision or jurisdiction over a jury verdict, but it did make it plain that action by Trial Courts or Appellate Courts in removing the case from the consideration of the jury by way of a directed verdict in "close or doubtful cases" did violence to the constitutional right under the Federal Constitution of an injured railroad employee to trial by jury. Yet in the instant case the Court of Appeals held the trial judge committed prejudicial error to the rights of respondent in not directing the case, thereupon raising the issue squarely as to whether the record was so devoid of evidence in support of the principal contentions of petitioner as to remove it from the "doubtful or close" category referred to in the *Bailey* case.

While perhaps the standard of a "doubtful or close case" as pronounced in the *Bailey* case might be considered somewhat nebulous in determining the test of a jury case under Section 51 of the Federal Employers' Liability Act, it would certainly seem that after the pronouncement of this Court in *Rogers v. Missouri Pacific Railroad Company*, 352 U. S. 500, 77 S. Ct. 443 (1957), a clear standard of what constitutes a jury case was prescribed. In the *Rogers* case this Court made the now oft-quoted pronouncement:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Of course, in the *Rogers* case one might argue that the question is still open as to what this Court meant when the so-called "rule of reason" was pronounced. However, the *Rogers* case was decided in 1956, ten years after the earlier case of *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946), in which this Court stated:

> "A measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

The jury with reason could conclude that there was no other logical place for the bug to come from except the pool of stagnant water with the dead rats, pigeons and vermin. This was the only place where such bugs or insects were described by any of the witnesses as having been seen. It was only a track width from the place where petitioner was standing at the time he was bitten. But, even if the bug could have come not only from the stag-

nant pool but from other sources as well, for which the respondent would not be liable, the jury under the foregoing authorities clearly had the right to make the inference that it did in fact come from the pool. The jury having made such inference, it was prejudicial error for the reviewing courts to substitute the inference of the jury for another inference favorable to that of respondent.

Questions 1, 4, 5, 7.

The Court of Appeals determined the test of causation for the within action to be as follows, from page 15 of the Opinion of the Court.

> "The question of causation should not get to the jury, and the Judge should direct a verdict for the defendant, unless the Court is of the opinion that a jury can reasonably find that the defendant's tort was an *efficient* cause of the damage to the plaintiff and not a mere antecedent fact." (Emphasis added.)

We will, of course, agree that if the employer negligence is a mere antecedent fact, petitioner has failed to prove a necessary element in his case; namely, that there be proof of some causal relationship, however slight, between the employer negligence and the injury of the workman. It does not necessarily follow, however, that this degree of causal connection rise to the level of being an "efficient" cause in order to be a basis for recovery. The word "efficient" is defined in the dictionary as meaning immediately effecting; as the efficient cause; hence, effective in causing or producing; as efficient action. It is quite clear, therefore, that although on the one hand the Court of Appeals in its Opinion recognized that common law proximate causation is not required in this action, nevertheless the Court fell into the error of applying this test under another label. There is little to distinguish an

"efficient" cause from a "proximate" cause. A cause to be proximate must be efficient.

The fallaciousness of the test applied by the Court of Appeals to hold that petitioner fell short of proving a case of legal causation may be demonstrated by analysis of many of the recent cases decided by this Court involving this identical issue. A classic illustration that "some" causation as distinguished from "efficient" causation will suffice to sustain the action may be found from the recently decided case of *Davis v. Virginia Railway Co.*, 361 U. S. 354, 80 S. Ct. 387 (1960).

The majority of this Court disagreed with the resolution of this issue by the State Court and held as follows from page 356 of 361 U. S.:

> "We think it should have been left to the jury to decide whether respondent's direction to complete the spotting operation within 30 minutes, plus the experience of the brakemen assigned to perform this 'hot job' *might have* precipitated petitioner's injury. The debatable quality of that issue, the fact that fair-minded men *might reach* different conclusion, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving uncontroverted evidence * * * to withdraw such a question from the jury is to usurp its function." (Emphasis added.)

With further regard to the *Davis* case, the evidence showed in fact that there was no specific order to even complete the job within 30 minutes. The evidence did show that the conductor was requested to complete his spotting during the lunch hour of the Ford employees and when asked how long the lunch hour of the Ford employees was, the petitioner replied, "Thirty minutes." In any event, this is another illustration that this Court will not tolerate

removing the issue of legal causation from the consideration of the jury under the legalistic label that the evidence would require the jury to indulge in "speculation and conjecture" rather than "proof."

Another good illustration on the degree of causation necessary to sustain the case is *Gibson v. Thompson,* 355 U. S. 18, 78 S. Ct. 2 (1957), involving injuries to an engineer. In the newly constructed yard in which the engineer worked, no walkway had been provided for the 900 foot walk from the roundhouse to yard C. Instead, it was necessary to walk across yards A and B, detouring around equipment and switching movements and progress in those yards. The gravel in the yards was loose and unpacked. It shifted beneath the engineer as he was walking through the yards and he fell and was injured. A jury found that the Missouri Pacific Railroad Company had failed to provide a reasonably safe place in which to work, and the Texas Court of Civil Appeals agreed, but the Texas Supreme Court reversed and ordered judgment for the railroad. That Court said that even though it was bound by Federal Decisions as to what constitutes negligence, *as to sufficiency of the evidence* it had the right to appraise the evidence in accordance with the concept of negligence as announced in prior cases. See 298 S. W. 2d 97, (1957). By this standard, the Texas Supreme Court found no negligence since the railroad had constructed the yard in accordance with specifications of the "best qualified construction engineers in America" and since, though other employees had had similar falls, *no one had ever complained to the railroad about the gravel.* However, again this Court reversed with its oft-repeated general admonition:

> "We hold that the proof justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

Even more dispositive of the current law on the issue of legal causation is the recently decided case of *Stinson v. Atlantic Coastline Railroad*, 355 U. S. 62, 78 S. Ct. 136 (1957). The facts as revealed in the State Court decision reported in 96 So. 2d 305 (1957), were that Stinson left his engine, which was on a wrecking job, and went to get something to eat. He was never seen again. His severed body was found across the track three-quarters of a mile from where he had last been seen. The body was nude and his clothes were wadded between the tracks 150 yards away. In Stinson's absence, the fireman had made several movements of the train, in violation of company rules, and had not sounded the bell before doing so, as the company rules required. *The Alabama Supreme Court held that the jury could find negligence from this breach of the company rules, but under the circumstances, in which Stinson's body was found, it held there was no evidence as to what had proximately caused his death, or that it was in the course of his employment.* It thereupon ordered what would be the equivalent of an Ohio directed verdict for the defendant. Again, this Court reversed the Alabama Supreme Court, stating merely that the evidence presented a jury question as to whether Stinson's death resulted in whole or in part from the negligence of the railroad.

Of similar import is *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107, 80 S. Ct. 173 (1959) reversing 256 F. 2d 156. In the *Sentilles* case, the seaman brought an action for damages under the Jones Act, 46 U. S. C. A. Sec. 688, claiming damages by reason of being pitched into the air and falling back to the deck of the ship thereupon allegedly activating or aggravating a previous latent tubercular condition. Judgment had been rendered for the seaman in the District Court which was reversed by the Circuit Court of Appeals because the medical testi-

mony as to causal connection between the traumatic incident and the tubercular condition was in the opinion of the Court "speculative and based upon conjecture." Once again, this Court rejected the label of "speculation and conjecture" as a ground for taking away a jury verdict, but held instead, page 109 of 361 U. S.:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evidenced so shortly after the accident, was in fact caused by the accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proof."

To the same effect, see *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, 81 S. Ct. 6 (1960) reversing 271 F. 2d 194 (6 C. C. A.). In the *Michalic* case, the claim was that a wrench dropped on the petitioner's foot aggravating an existing Berger's disease. As noted from the opinion, Michalic contended that the proofs were sufficient to justify the jury in finding with reason that there was play in the jaw of the wrench he was using which prevented a tight grip on the nut, thereby entitling the jury to find that respondent, the shipping company, furnished him with a defective wrench. The trial judge found the evidence to be insufficient to present a jury question whether the wrench was a reasonably suitable appliance, *because on the theory that the grip was worn there was never any mention of the grip in the case. The Circuit Court of Appeals took the same view saying there was no evidence that the open or jaw end of the wrench was in any way deficient. The fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or han-*

dle in the wrench. The Opinion of the Sixth Circuit Court of Appeals may be found in 271 F. 2d 199. However, this Court stated as follows:

> "We think that both lower Courts erred. True, there was no direct evidence of play in the jaw of the wrench, as in *Jacob v. New York City*, 315 U. S. 752, 754. But direct evidence of a fact is not required. *Circumstantial evidence is not only sufficient but may also be more certain, satisfying and persuasive than direct evidence.*" (Emphasis added.)

There is nothing unusual about the foregoing pronouncement and it can, of course, be said with certainty that both the trial court and the Sixth Circuit Court of Appeals recognized that it is not necessary to have any direct evidence to prove an essential fact in issue. A sufficient degree of circumstantial evidence has always been recognized even in common law as proof of a fact in issue. *The real question is in evaluation of the circumstantial evidence to determine whether in fact the evidence as thus adduced is sufficient to entitle the jury to make the inference of the essential facts or whether it falls below the standard of proof and must be relegated to the role of speculation and conjecture.* It seems that once again the mandate is clear that the decision as to whether the evidence is sufficient to permit an inference of an essential fact, or falls below the standard of proof required, and is mere speculation and conjecture is not, in an F. E. L. A. case, or a Jones Act case, a decision which the Appellate Court may make but is part of the right of the employee to have the jury weigh the evidence. Once there is some evidence of a fact, the question as to whether that evidence is sufficient to entitle the jury to make an inference of a further fact essential to support the cause of action is, under the Federal Employers' Liability Act, a

function strictly for the jury. The jury cannot be deprived of its right to exercise that function by classifying the circumstances as being within the realm of mere speculation and conjecture.

Other cases which might be cited in support of the proposition that an efficient producing cause is not the test to be applied in a Federal Employers' Liability Act case as the standard of legal causation, are *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *McBride v. Toledo-Terminal Railroad Co.*, 354 U. S. 517, 77 S. Ct. 1398 (1957); *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *Schulz v. Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608 (1956); *Harris v. Pennsylvania Ry. Co.*, 361 U. S. 15, 80 S. Ct. 22 (1959).

Question 9.

This Court has, of course, on frequent occasions held that in the absence of proof of negligence a verdict for petitioner cannot stand. See *Inman v. B & O Railroad Co.*, 361 U. S. 227, 80 S. Ct. 242 (1959); *New York, New Haven and Hartford Railroad Co., v. Hanagan*, 364 U. S. 441, 81 S. Ct. 198 (1960). However, it is equally clear from the authorities already cited that where the proofs justify a finding of negligence, a verdict for petitioner should not be reversed under the standards of judicial review pronounced by this Court on a theory that the causal connection between such negligence and injury is based upon speculation and conjecture, particularly when there is an evidentiary basis in the record for a finding of causal connection.

It should be noted, however, at the outset, that in both the *Inman* and the *Hanagan* cases this Court found no evidence of *negligence*, and that the injuries were in fact brought about by the intervention of a third party over

whom there was no showing that the railroad had any right of direction and control. Neither the *Inman* nor the *Hanagan* cases were concerned with the sufficiency of proof of *causal connection* once the *negligence* of the employing railroad was established to the satisfaction of the Court. *In the instant case, as noted on page 13 of the Opinion of the Court of Appeals, the necessary element of negligence was established from the record to the satisfaction of that Court. Thus, the Court of Appeals stated, page 13:*

> "We can, with reason, say that, to maintain for a period of years a stagnant, vermin-infested pool of water on and over which insects gather, on property where employees are required to work, could furnish the gravamen of an offense under the Federal Employers' Liability Act."

In this connection, it is worthy to note that unlike the *Inman* and *Hanagan* cases no third party is here involved. The negligence was the improper maintenance of its own property by the respondent, and a static condition of many years existence of which, according to the proofs, the respondent had adequate knowledge. It cannot be argued with any degree of fairness that the insect in the instant case, which was merely a transmittal agency, can be likened to the "drunken driver" in the *Inman* case, or the "suicide" in the *Hanagan* case.

At this point it is well to digress and analyze further the Opinion of the Court of Appeals as found on pages 15 and 16 in which the Court fell into the error of concluding that the evidence in support of the inference that the poisonous insect came from the stagnant pool of water fell short of the required degree of proof *because the petitioner had failed to adduce evidence to exclude the fact that it may have come from the nearby putrid mouth of the Cuyahoga River, or from weeds, or unsanitary places situated on property not owned or controlled by the railroad.* It was

for this reason that the Court of Appeals determined that the evidence that it came from the pool of putrid water under the Columbus Road Bridge required guesswork, speculation, or conjecture on the part of the jury. *We feel that any fair reading of the Opinion of the Court of Appeals makes it obvious that what that Court is saying is that there was evidence, as already alluded to in this brief, from which it might have been inferred that the insect became infected from the pool of water and thereupon crawled up petitioner's pants leg and bit him, setting in motion the chain of events which led to his present condition. But there was likewise evidence that the insect may have come from contaminating sources over which the respondent had absolutely no right of control and produced the same result; that to determine from which source this particular insect came would involve pure speculation and conjecture on the part of the jury.* This is but another way of saying that where there are two cause each of which are capable of producing the harm complained of, but for only one of which the defendant would be liable, it devolves upon the petitioner, having the burden of proof, to eliminate the non-liability cause.

However, as already noted from the many citations herein set forth, particularly *Lavender v. Kurn, supra; Rogers v. Missouri Pacific Railroad Co., supra; Harris v. Pennsylvania Railroad Co., supra*; and *Michalic v. Cleveland Tankers, Inc., supra*; the power of the jury to make the inference that the insect came from the liability source, rather than one of the non-liability sources mentioned, is peculiarly a jury function under the law of causation as applied to Federal Employers' Liability Act cases. It was the failure to recognize this role of the jury which forms the fundamental basis of the error of the Court of Appeals as is demonstrated by their use and reliance upon the lan-

guage of "efficient causation" in the Opinion of that Court. The Court of Appeals thus reversed a judgment in favor of petitioner and entered final judgment for respondent on the false premise that petitioner must not only adduce proof of causation but eliminate non-liability causes as well. This common law doctrine which is part of the law of "proximate causation" has repeatedly been repudiated by this Court in Federal Employer Liability Act cases.

In this connection, we believe that the principles of law enunciated by this Court in the leading case of *Tennant, Admx. v. Peoria & P. U. Railway Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944), have peculiar application to the issues raised by the instant petition.

In the *Tennant* case it will be recalled a switchman was killed under circumstances which the Courts below (134 F. 2d 860) held insufficient to establish evidence of causal connection. There were disputing inferences which could reasonably be drawn from the evidence, all as more fully pointed out by this Court on page 33 of its Opinion, 321 U. S. On page 34 of 321 U. S., the Opinion of the Court, the following is contained:

> "In holding that there was no evidence upon which to base the jury's inference as to causation, the Court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the Court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of *direct* proof as characterizes the one adopted by the jury. But to the extent that

they involve a disobedience of duty by Tennant no presumption of risk or contributory negligence on Tennant's part be presumed in order to negate an inference that death was due to respondent's negligence." (Emphasis ours.)

321 U. S. 35, of the Opinion of the Court:

"It is not the function of a Court to search the record for conflicting *circumstantial* evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. *The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable* * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury *could* have drawn different inferences or conclusions or because Judges feel that other results are more reasonable." (Emphasis ours.)

It is clear from the caveat of the *Tennant* case that the Court of Appeals fell into the very error admonished against by this Court. Specifically, in removing from the jury its function to select from among conflicting inferences and conclusions that which the jury considered most reasonable, even though there were proofs in the record for the jury to select the very inference which it did, namely, that the bite to petitioner which caused his condition of ill-being was directly connected to the unsanitary conditions maintained by respondent in said pool of stagnant water.

CONCLUSION.

We feel that we have demonstrated from the controlling authorities that there is a sufficiency of proof on the record for the jury to make the inference which it did that petitioner was bitten by an insect which came from a disease-producing filthy pool of stagnant water, improperly maintained by the respondent on its premises under its control, in which for years it permitted dead pigeons and dead rats to accumulate and rot. There was evidence for the jury to conclude that these unsanitary conditions were the producing cause of petitioner's condition of ill-being. By labeling the proof adduced in support of petitioner's claim of a causal connection as "speculation and conjecture," the Court of Appeals did violence to the mandate of this Court that the function of weighing the evidence to determine whether it meets the standard of an inference is purely a function of the jury in this class of case. To remove the cause from the consideration of the jury by reason of a failure of the petitioner to eliminate other sources for which the respondent might not be liable as an efficient-producing cause of the injury was in fact a usurpation of petitioner's rights under the Federal Constitution as an employee in Interstate Commerce to a trial by jury. The determination as to the right to trial by jury has been construed by this Court and required by it to have uniform application throughout the United States. *The Court of Appeals itself having found evidence in the record to support a finding of causal connection between the negligence complained of and the resulting injury had under the law exhausted its function, Lavender v. Kurn, supra.* Its duty then became that of affirming the judgment entered by the trial court *inasmuch as in every other respect the Court of Appeals found no error prejudicial to the appellant railroad.*

RELIEF PRAYED FOR.

By reason of the foregoing, petitioner respectfully prays of this Court that his petition for writ of certiorari to the Court of Appeals for Cuyahoga County, Eighth Judicial District of Ohio, be granted by the Supreme Court of United States; that judgment be thereupon entered by the Supreme Court of the United States as a reversal of the judgment of the Court of Appeals of Cuyahoga County; that this Court reinstate the verdict of the Court of Common Pleas of Cuyahoga County in favor of petitioner entered upon the special verdict of the jury, reduced to judgment in favor of petitioner in the sum of Six Hundred Twenty-Five Thousand Dollars ($625,000.-00), with interest accrued according to law; and that a mandate issue by the Supreme Court of the United States to the Court of Appeals for Cuyahoga County to accordingly reinstate the judgment for petitioner.

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APPENDIX A.

Opinion of the Court of Appeals.

No. 25,087.

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT.

STATE OF OHIO, CUYAHOGA COUNTY, SS.

JAMES GALLICK,

Appellee,

v.

THE BALTIMORE AND OHIO RAILROAD CO.,

Appellant.

OPINION.

HUNSICKER, *J.*

James Gallick, an employee of Baltimore and Ohio Railroad Co., brought an action in the Common Pleas Court of Cuyahoga County, Ohio, under the Federal Employers' Liability Act, alleging that he suffered injury because he was not furnished, by his employer, a reasonably safe place to work, and was required to work under unhealthful and unsanitary conditions.

Mr. Gallick, along with other employees of the Baltimore and Ohio Railroad Co., was engaged, over a period (2) of time, at a place known as the "230 Seneca Street job." The location of the work was in the "flats" section of Cleveland, Ohio, a highly-industrialized area adjacent to the Cuyahoga River, a short distance south of the river's entrance into Lake Erie. Specifically, Mr. Gallick, the foreman of the railroad crew, along with others, spotted cars to be moved into the yards, or to industrial establishments. He was required, during the month of August,

1954, to walk along a B & O Railroad right of way, consisting of one line which ran along the river near the industrial plants serviced by such railroad.

This railroad line passed under several bridges, among which was the Columbus Street bridge. Under this bridge, on the east side of the railroad right of way, was a ditch, which, for many years, contained stagnant water, both in the dry and wet seasons of the year. In and about this ditch were dead and decayed rats and pigeons. Insects were seen on, over and about this stagnant pool. The evidence shows that the condition of this pool was known to the employees of the railroad for a long time before the occurrence about which Mr. Gallick complains.

Mr. Gallick, on or about the 10th day of August, 1954, while walking along the west side of the railroad right of way, under and also near the Columbus Street bridge, stopped momentarily to see where the railroad engine was that (3) would pick up some cars. He then took a step or two, at which time he felt a bite on his left leg, a few inches above his left knee. He put his hand on the place where he felt this bite, and grasped between his finger and thumb an object which he said felt like an insect, and which, when squeezed, cracked or popped. This object, or insect, was inside his left trouser leg. When he released the object it slipped out of his left trouser leg. Before he could locate it, the engine was nearby, and he boarded one of the cars. Mr. Gallick said the object was about as long as the width of three fingers, and as thick as his little finger. The size of the insect was thus indicated to be about two inches long by one-half inch wide.

Later that day, after his lunch period, about 7 o'clock, p.m. (Mr. Gallick worked from 3 p.m. until 11 p.m.), he

went to the washroom; and, because he felt some sensation on the back on his left leg, he washed the place where he had felt the bite. When he arrived home after work, he showed this place to his wife, who said it looked like a bite, and that it was pink on the top, and about the size of a fingernail. It grew redder and larger, and, since it did not heal, but broke open like a boil, Mr. Gallick went to a doctor, several days after the alleged bite, who administered penicillin and gave an ointment for dressing the by-now open lesion.

(4) The wound did not respond to treatment, and another doctor was consulted. The condition grew progressively worse, until, after several years of hospital attention by many, many doctors, examinations, tests and treatments, including the amputation of both legs, Mr. Gallick is permanently confined in a hospital suffering from many severe pus-forming lesions on his body. It was stated by one of the doctors who treated him that one arm may have to be amputated to relieve the effect of a lesion in the armpit. None of the doctors who have treated and studied his case can give the etiology of his condition.

One hospital and some of the doctors state the condition of Mr. Gallick to be "pyoderma-gangrenosa, secondary to insect bite."

The trial of Mr. Gallick's action against B. & O. Railroad Company proceeded upon two claimed grounds of negligence: first, "(4) In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties"; and, second "(6) In that it knew that, by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions."

Baltimore & Ohio Railroad Company, denying any negligence on its part, said that, if the condition of Mr. Gallick arose from an insect bite sustained by him while working upon railroad property, "the likelihood of harm and consequences" to Mr. Gallick from such bite "were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose requiring the exercise of care by" the railroad "to protect" Mr. Gallick "from any such risk."

After a lengthy trial, and the submission of the case to a jury with a special verdict and numerous interrogatories, a judgment for $625,000 was entered by the Court of Common Pleas.

From this judgment an appeal on questions of law has been brought to this Court by Baltimore and Ohio Railroad Co., which set out sixteen assignments of error, as follows:

"1. The court erred in overruling defendant's demurrer to plaintiff's petition.

"2. The court erred in reducing the seated panel to 10 jurors by excusing two seated members of the jury panel of twelve at the request of the two jurors, after defendant had exhausted its four peremptory challenges to such panel and plaintiff had not exhausted its peremptories, and in proceeding further with the remaining panel of 10 over defendant's objection.

"3. The court erred in limiting the jury's view of defendant's premises and surrounding territory to a very small part of the area which was relevant and pertinent to the issues in the case and about which there was evidence presented at the trial.

"4. The court erred in admitting evidence offered by plaintiff over the objection of this appellant.

(6) "5. The court erred in overruling defendant's motion for judgment on the pleadings, and for a di-

rected verdict at the close of plaintiff's case and at the close of all the evidence.

"6. The court erred in refusing to give to the jury before argument certain written requests to charge submitted by this appellant.

"7. The court erred in submitting to the jury before argument certain special charges submitted by the adverse party and objected to by this appellant.

"8. The court erred in its charge to the jury.

"9. The court erred in refusing to submit to the jury certain special interrogatories to be answered by the jury, as requested by appellant.

"10. The court erred in submitting to the jury an improper, misleading, and incomplete special verdict.

"11. The court erred in entering judgment for plaintiff upon the special verdict returned by the jury, and in not entering judgment for the defendant thereon.

"12. The court erred in overruling appellant's motion for judgment notwithstanding the verdict.

"13. The court erred in overruling appellant's motion for a new trial.

"14. The damages assessed by the jury in its special verdict are excessive and appear to have been given under the influence of passion and prejudice.

"15. The damages assessed by the jury are excessive and not sustained by the evidence.

"16. Other errors occurring at the trial and in the judgment."

(7) We do not believe it necessary to discuss in detail each of the assigned errors, but, since this matter is brought under the Federal Employers' Liability Act, our consideration of the problem posed by these assignments of error must be controlled by the interpretation of such act by the Supreme Court of the United States. *Dice v.*

Akron, Canton & Youngstown Rd Co., 91 O. App. 239; *Dice v. Akron, Canton & Youngstown Rd. Co.*, 342 U. S. 359; *Harris v. Pennsylvania Rd. Co.*, 198 O. App. 541.

> "Under this statute [45 U. S. C. A., Sec. 51] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."
>
> *Rogers v. Missouri Pacific Rd. Co.*, 352 U. S. 500, at 506; 77 S. Ct. 443.

The usual concept of proximate causation, as we know it in the law of Ohio, is not to be applied in cases such as we have herein, which arise under the Federal Employers' Liability Act. *Rogers v. Missouri Pacific Rd. Co., supra; Schulz, Admx., v. Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608.

With these preliminary and fundamental statements of the rules we must follow in determining the instant case, let us examine the special findings of the jury to see what they found as to the determinative issues.

(8) The determinative issues may be briefly summarized as follows: Is there some credible evidence to support a finding of employer negligence? Did such negligence play any part, even the slightest, in producing the "bite" suffered by Mr. Gallick?

We are required, in examining the special finding of a jury, to liberally construe the answers with a view to ascertaining the meaning of such answers. *Klever v. Reid Brothers Express, Inc., et al.*, 151 O. S. 467, 86 N. E. 2d 608; *Elio v. Akron Transportation Co.*, 147 O. S. 363, 71 N. E. 2d 707.

The rule announced by the Supreme Court of the United States, with reference to the effect of local practice rules, such as the interpretation of interrogatories, is found

in *Arnold v. Panhandle & Santa Fe Railway Co.*, 353 U. S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840, wherein that court said that the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

There are inconsistencies in the answers to the special verdict and the interrogatories made by the jury in the instant case. They did find, however, that the Baltimore and Ohio Railroad Co. was negligent in maintaining the stagnant pool by the side of its track. Although the jurors stated that they could not answer the question as to Mr. Gallick (9) being furnished a safe place to work, they did find a cause and effect relationship between the stagnant pool and the bug bite suffered by Mr. Gallick. After its affirmative answer to the proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff, the jury found no reasonable probability or foreseeability of the Baltimore and Ohio to appreciate this proximate causal relationship between the stagnant water and other conditions leading to the present physical condition of Mr. Gallick.

Are such findings of the jury sufficient to sustain the judgment? It is difficult to reconcile the several pronouncements of the Supreme Court of the United States with reference to the application of the Federal Employers' Liability Act. A liberal attitude on the part of the court majority is apparent, but an adherence to fixed principles is not readily discernible. 69 *Harvard Review* 1441.

In many of the cases which we have examined, the causative factor has been some tangible object owned by the railroad, even though it was only gravel or an oversized cinder in the roadbed. *Webb v. Illinois Central Rd. Co.*, 352 U. S. 512, 1 L. Ed. 2d 503; *Ferguson v. Moore-*

McCormack Lines, Inc., 352 U. S. 521, 1 L. Ed. 2d 511; *Lavender, Admr., v. Kurn, et al.*, 327 U. S. 645, 90 L. Ed. 916.

(10) In the instant case, as well as in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 4 L. Ed 2d 142; *Schulz, Admx., v. Pennsylvania Rd. Co.*, 350 U. S. 523, 100 L. Ed. 668; and *Inman v. Baltimore & Ohio Rd. Co.*, 361 U. S. 138, 4 L. Ed. 2d 198, that which caused the injury was an outside force, such as unusual wave, ice on a boat, or a third person.

Through all these cases there runs the underlying general principle that, before a plaintiff may recover damages, there must be proof of some causal relationship between the employer negligence and the injury or death of the workman.

In *Tennant, Admx., v. Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 88 L. Ed. 520, the court said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 US 54, 67, 87 L. ed. 610, 617, 63 S. Ct. 444, 143 ALR 967.
>
> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' Galloway v. United States, 319 US 372, 395, 87 L. ed. 1458, 1473, 63 S. Ct. 1077; Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 74 L. ed. 896, 50 S. Ct. 281."

In the recent case of *Inman v. Baltimore & Ohio Rd.* (11) *Co.*, 361 U. S. 138, 4 L. Ed. 2d 198, the court, after cit-

ing with approval the case of *Rogers v. Missouri Pacific Rd. Co.*, 352 U. S. 500, 1 L. Ed. 493, said: "The Act does not make the employer an insurer."

In the *Rogers v. Missouri Pacific Rd. Co* case, *supra*, there is an apparent reversal by the court of its position stated in *Tennant, Admx., v. Peoria Pekin Union Ry Co.*, *supra*, and quoted above, wherein a "proximate cause in whole or in part" is necessary before recovery by an injured employee of the railroad. In the *Rogers v. Missouri Pacific Rd. Co.* case, the court, after rejecting the rule of proximate causation, said, with regard to this question,

> "* * * That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.
>
> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly (12) imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to negligence. (Emphasis added.)
>
> "The law was enacted because the Congress was dissatisfied with the common-law duty of the master

to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence.

"The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question, whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

We do know by overwhelming testimony that the pool of stagnant, vermin-infested water was alongside the Baltimore and Ohio tracks for many years prior to the alleged "bite" suffered by Mr. Gallick. We know, by definite evidence, that insects were in and about this stagnant pool. There is a conflict in the testimony (resolved against Baltimore and Ohio) as to whether any insect of the size described by the injured employee might infest this pool, and which insect might "bite" a man.

We have sufficient credible evidence to conclude, as did the jury, that Mr. Gallick suffered a "bite" on railroad property by some insect while working for that railroad. We have an abundance of testimony that from such "bite" severe consequences to Mr. Gallick have ensued.

(13) We can, with reason, say that, to maintain for a period of years a stagnant, vermin-infested pool of water on and over which insects gather, on property where its employees are required to work, could furnish the gravamen of an offense under the Federal Employers' Liability Act.

No similar "bite" or other insect bites were ever complained about, although complaint about the general un-

sanitary condition at the location of the pool was made to the railroad.

Throughout all the cases involving employer liability, in cases such as we have before us, the United States Supreme Court has held that a right to recover is established if, from the facts proved, negligence and its causal relationship to the injury and damage may reasonably be inferred; a jury question is presented if, with reason, "the conclusion may be drawn that negligence of the employer played any part at all in the injury."

From the facts heretofore set forth, it is obvious that the plaintiff's case, if it is to be sustained, must rest upon inferences to be drawn from the evidence. There is no direct evidence that the existence of the unidentified bug at the time and place had any connection with the stagnant and infested pool.

We observe that proof is the effect of evidence—the establishment of a fact by evidence—and in litigation (14) there may be evidence which does not amount to proof. When there is neither direct evidence, nor reasonable inferences to be drawn from evidence, whether direct or circumstantial, a conclusion based upon such absence of evidence or reasonable inference is mere conjecture, and the drawing of a further inference from conjecture does not amount to proof. In proving a defendant's culpability, the proof must show that the tort is distinctly traceable as one of the efficient antecedents of the damages, and has a share in subjecting plaintiff to injury.

The observation made above refers only to legal cause. We are not here concerned with cause in the so-called "philosophic sense," for the reason that the causes of causes are infinite.

If the plaintiff's case is to be sustained, we must infer that this undescribed (except as to size and biting quali-

ties) insect or bug had been attracted to the area in which the plaintiff was hurt by the stagnant pool, and that its bite caused the plaintiff's condition; that the pool created conditions and influences which helped to incubate or furnish an environment for the bug, whose bite was poisonous to the plaintiff; or, that the insect, having traveled from other areas, became contaminated or infected by the pool with a substance injurious to man, and that this substance infected the plaintiff when bitten.

(15) The law is plain that, before the question of causation can be submitted to a jury, the trial judge must decide a preliminary question—*i.e.*, whether from the evidence a jury could reasonably find the existence of a causal relation. If the judge decides in the affirmative, it will then be for the jury to say whether they do find. In other words, the judge must say whether on the evidence, a causal relation may be reasonably inferred. If the judge rules that it may be so inferred, the jurors then must say whether, from the evidence, the causal relation is inferred by them.

The question of causation should not get to the jury, and the judge should direct a verdict for the defendant, unless the court is of the opinion that a jury can reasonably find that the defendant's tort was an efficient cause of the damage to the plaintiff *and not a mere antecedent fact.*

As we view the record before us, we have a chain of possibilities that the negligence of the defendant might have shared in subjecting the plaintiff to damage and injury, but the proof of a legal causal connection between the negligence and damage falls short of that required for the consideration of a jury.

Whether the insect causing the damage had any connection with the pool of stagnant water on the defendant's premises, or whether it came from the nearby putrid mouth of the Cuyahoga River, or from weeds, or unsani-

tary places situated (16) on property not owned or controlled by the railroad, presents only a series of guesses and speculations, which speculations make a chain of causation too tenuous to support a conclusion of liability on the part of the railroad.

We determine, therefore, that, where there is, as here, only a guess or speculation of a causal connection between the negligence of the employer and the injury of an employee, no liability attaches, and a judgment based upon such speculation cannot be sustained.

All other claimed errors have been examined, and we find none prejudicial to the rights of the appellant.

The judgment herein is reversed as contrary to law, and final judgment will be entered for the railroad-appellant.

Reversed and final judgment for the appellant.

DOYLE, *P. J.*, and GRIFFITH, *J.*, concur.

(Doyle, *P. J.*, and Hunsicker, *J.*, of the Ninth District, and Griffith, *J.*, of the Seventh District, sitting by designation in the Eighth District.)

APPENDIX B.

Journal Entry of the Court of Appeals.

April 11, 1961:

This day this cause, having been previously consolidated with case No. 25,017, came on to be heard upon appeal on questions of law, assignments of error, bill of exceptions, pleadings, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, Ohio, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the appellant, in that the Court of Common Pleas erred:

(1) In overruling appellant's motion for a directed verdict at the close of all the evidence.

(2) In overruling appellant's motion for judgment notwithstanding the verdict.

and in that said Court entered judgment for appellee when such judgment should have been entered for the appellant.

It is therefore considered, ordered, and adjudged by this Court that the judgment of the Court of Common Pleas of Cuyahoga County be and the same is hereby reversed and held for naught. And the Court coming now to render the judgment which the Court of Common Pleas of Cuyahoga County ought to have rendered, final judgment is now entered in this Court for the appellant.

It is further ordered that this cause be remanded to the Court of Common Pleas of Cuyahoga County, Ohio, to carry this judgment into effect and for execution; and that the appellant recover from the appellee its costs herein expended, taxed at $_____. To all of which, appellee, by counsel, excepts.

All other claimed errors have been examined, and this Court finds none prejudicial to the rights of the appellant. To which appellant, by counsel, excepts.

APPENDIX C.

Journal Entry of the Court of Common Pleas.

The Court finds that the jury in the within cause was duly impanelled and sworn; that proper request was made to the Court by the defendant for a special verdict as provided by law; and that a special verdict was returned by the jury.

The Court further finds that the photographic copies annexed hereto as Exhibits "A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W" are an exact reproduction of the original special verdict returned by the jury and made a part of the record of the within case; and that said Exhibits annexed hereto as Exhibits A through W constitute the verdict of the jury.

The Court being fully satisfied that Exhibits A through W annexed hereto constitute the verdict of the jury, the Court hereby incorporates the same by reference as part of this Journal Entry as though expressly rewritten herein.

The Court further finds that proper request was made by the defendant for the submission of a separate finding of fact by the jury and that Exhibit "X" annexed hereto is an exact photographic copy of the finding of fact of the jury. The Court therefore incorporates Exhibit "X" as annexed hereto as a part of this Journal Entry as though expressly rewritten herein.

The Court being of the opinion that the special verdict of the jury as referred to and incorporated within this Journal Entry and annexed hereto as Exhibits A through W is sufficient in law to require a judgment for the plaintiff; and the jury by said special verdict having found that plaintiff's damages are Six Hundred Twenty-Five Thousand Dollars ($625,000.00); and the Court being of the opinion that the finding of fact of the jury, as referred to

and incorporated within this Journal Entry and annexed hereto as Exhibit "X" is consistent with the verdict of the jury; it is hereby ordered that plaintiff recover of the defendant the said sum of Six Hundred Twenty-Five Thousand Dollars ($625,000.00), for which sum, with the costs of this action, judgment is hereby rendered in favor of plaintiff and against the defendant.

Special Verdict.

EXHIBIT A.

We, the jury, being first duly impanelled and sworn and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence, the following determinative issues in this cause:

1. Did a pool of stagnant water exist under the Columbus Road Bridge during the entire early part of August, 1954? Yes.

(Names of twelve jurors omitted.)

EXHIBIT B.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

2. Was the pool of stagnant water on the premises of the defendan. B. & O.? Yes.

(Names of twelve jurors omitted.)

EXHIBIT C.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number

thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

3. If the answer to 2 is yes, was the defendant B. & O., in possession of the premises under the Columbus Road Bridge whereon the stagnant water stood? Yes.

(Names of twelve jurors omitted.)

EXHIBIT D.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

4. Did the defendant B. & O. have under its control the premises under the Columbus Road Bridge wherein the stagnant water stood? Yes.

(Names of twelve jurors omitted.)

EXHIBIT E.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

5. If the answer to question No. 2 is yes, did dead pigeons accumulate under the bridge in the stagnant water? Yes.

(Names of ten jurors omitted.)

EXHIBIT F.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

6. If the answer to No. 2 is yes, did dead rats accumulate under the bridge in the stagnant water? Yes.

(Names of nine jurors omitted.)

EXHIBIT G.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

7. If the answer to No. 2 is yes, did vermin accumulate under the bridge in the stagnant water? Yes.

(Names of twelve jurors omitted.)

EXHIBIT H.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

8. If the answer to No. 2 is yes, did bugs accumulate under the bridge in the stagnant water? Yes.

(Names of twelve jurors omitted.)

EXHIBIT I.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

9. Was plaintiff required to perform his work duties in close proximity to the area referred to in question No. 1? Yes.

(Names of twelve jurors omitted.)

EXHIBIT J.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

10. On approximately August 10, 1954, was plaintiff bitten by an insect? Yes.

(Names of twelve jurors omitted.)

EXHIBIT K.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

11. If the answer to Question No. 10 is yes, was he bitten while performing his usual and customary work duties? Yes.

(Names of twelve jurors omitted.)

EXHIBIT L.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

12. If the answer to No. 10 is yes, was he bitten near or about the Columbus Road Bridge? Yes.

(Names of twelve jurors omitted.)

EXHIBIT M.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number

thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

13. Did the defendant B. & O., provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?

Jury can't decide on this question.

EXHIBIT N.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

14. If the answer to question 1 is yes, did the defendant B. & O. know that by permitting the accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs and vermin would be attracted to said area? Yes.

(Names of ten jurors omitted.)

EXHIBIT O.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

15. If the answer to 14 is yes, did the defendant B. & O. know that its employees would have to work in this area? Yes.

(Names of ten jurors omitted.)

EXHIBIT P.

We, the jury being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

16. Was the defendant negligent in one or more of the particulars alleged in the petition? Yes.

(Names of twelve jurors omitted.)

EXHIBIT Q.

We, the jury being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

17. If the answer to Question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence.

There existed a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs and vermin.

(Names of ten jurors omitted.)

EXHIBIT R.

We, the jury being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

18. Was the illness or disease from which Mr. Gallick now suffers caused in whole or in part by an insect bite sustained by him on defendant B & O's premises? Yes.

(Names of twelve jurors omitted.)

EXHIBIT S.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

19. Were the injuries to the plaintiff proximately caused in any part, even the slightest, by any one or more of the acts or omissions of the defendant? Yes.

(Names of twelve jurors omitted.)

EXHIBIT T.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

20. If the answers to any one of the questions numbered 1, 5, 6, 7, and 8, is yes, was there any reason for the defendant B. & O., to anticipate that such would or might probably result in a mishap or an injury? No.

(Names of ten jurors omitted.)

EXHIBIT U.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

21. Was there a proximate causal relationship to the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? Yes.

(Names of twelve jurors omitted.)

EXHIBIT V.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B. & O. to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? No.

(Names of twelve jurors omitted.)

EXHIBIT W.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

23. What amount of money will compensate the plaintiff, James T. Gallick, for his injuries and damages, if any, resulting proximately from this accident?

$26,000.00.

(Names of twelve jurors omitted.)

EXHIBIT X.

Interrogatories.

5(a) Where on plaintiff's body was his first skin infection?

Answer: Back of left leg approximately 4" above knee—more to the outside.

(Names of twelve jurors omitted.)

APPENDIX D.

Orders of the Supreme Court.

Dec. 6, 1961:

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the defendant-appellee recover from the plaintiff-appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

Motion for an Order Directing the Court of Appeals for Cuyahoga County to Certify its Record.

Dec. 6, 1961:

It is ordered by the Court that this motion is overruled.

Cross Motion for an Order Directing the Court of Appeals for Cuyahoga County to Certify its Record.

Dec. 6, 1961:

It is ordered by the Court that this motion is overruled.

THE SUPREME COURT OF OHIO

COLUMBUS.

January 10, 1962

Mr. A. H. Dudnik
Attorney at Law
Engineers Building
Cleveland, Ohio

Re: James Gallick, appellant, v. The Baltimore and Ohio Railroad Company, appellee
Case No. 37218

Dear Mr. Dudnik:

We are directed by the Supreme Court to advise counsel in this case that the Court has considered the application for rehearing, filed therein, and that a rehearing is denied.

Sincerely yours,

JOHN MCCONNELL.

APPENDIX E.

Statutes Involved.

Title 45, U. S. C., Section 51.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Title 45, U. S. C., Section 56.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143 § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167, Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

Ohio Revised Code, Section 2315.15.

When requested by either party, the court shall direct the jury to give a special verdict in writing, upon any issues which the case presents.

Ohio Revised Code, Section 2315.16.

When either party requests it, the court shall instruct the jurors, if they render a general or special verdict, specially to find upon particular material allegations contained in the pleadings controverted by an adverse party, and submitted by the court in writing, to the jury, and shall direct the jury to return a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk.

Ohio Revised Code, Section 2315.17.

When a special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly.

APPENDIX F.

Amended Petition.

No. 697,202.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

JAMES GALLICK,

Plaintiff,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,

Defendant.

AMENDED PETITION.

Now comes the plaintiff and after having duly obtained leave of court files this his amended petition. Plaintiff for his cause of action says that at all times herein alleged the defendant was and is a railroad corporation, organized and existing under the laws of the State of Maryland, and was at the time of the occurrence herein set forth and is now carrying on its business as an interstate common carrier of passengers and freight within the jurisdiction of this court; that at all times herein alleged, plaintiff was and is a resident of the City of Parma, County of Cuyahoga and State of Ohio, employed by the defendant as a Yard Foreman, in which capacity the plaintiff was engaged in the movement, switching and classification of freight cars on tracks of the defendant located in the vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, County of Cuyahoga, State of Ohio; that the action of plaintiff is brought under, and is governed by the provisions of the Federal Employers' Liability Act,

45 USCA, Sections 51-59 and Amendments thereto; that the work duties of the plaintiff at all times herein alleged substantially affected and were in furtherance of interstate commerce.

Plaintiff further says that in the month of August, 1954, the exact date and time being uncertain, he was engaged in the performance of his duties involving the movement, switching and classification of railroad freight cars at defendant's tracks located in vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, County of Cuyahoga, State of Ohio; that in close proximity to said tracks in August of 1954, and for a long time prior thereto to the knowledge of the defendant, there existed a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs, lice and vermin; that plaintiff was required to perform his work duties in close proximity to said area; that in the month of August, 1954, while performing his usual and customary work duties in and about the Columbus Road Bridge and Lime Road tracks of defendant, the plaintiff was bitten by an insect following which he developed serious, painful and disabling injuries as will be described hereinafter.

Plaintiff further says that the defendant was negligent in the following respects:

1. In that it required plaintiff to perform his work duties in close proximity to an area which was known by the defendant to be infested with dead pigeons, rats, bugs, lice and vermin.

2. In that it failed to drain said stagnant pool of water which would have eliminated the hazard to the health of the employees compelled to work in the vicinity of said area and more particularly, this plaintiff.

3. In that it failed by the use of chemicals or otherwise to eliminate from the said area where plaintiff was required to work the accumulations of dead pigeons, rats, bugs, lice and vermin, although it knew of said condition which existed for many years prior to the injury to plaintiff.

4. In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties.

5. In that it failed to inspect and spray the empty freight cars being moved, switched or classified in the vicinity on the track of the defendant near Lime Road and the Columbus Road Bridge to rid the same of insects, bugs, lice and vermin.

6. In that it knew that by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs, and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions.

Plaintiff further says that by means of and in consequence of the foregoing negligent acts and omissions of the defendant, and as the direct and proximate result thereof, he was caused to be bitten by an insect which caused his system to become poisoned and which resulted in the formation of deep, acute ulcerations with draining about his extremities and body, which condition has not abated with time.

Plaintiff further says that as a result of his injuries, it had been necessary for him to undergo extensive hospitalization, medical care and attention, and surgery, for all of which he has sustained expense, the full extent and amount of which is, as yet, unascertainable inasmuch as plaintiff is receiving medical care and attention and hospitalization at the time of filing this, his amended petition.

Plaintiff further says that his injuries have necessitated surgery for the amputation of both legs, that he is

confined to his hospital bed and a wheel chair and will remain so into the indefinite future.

Plaintiff further says that his injuries have caused him to suffer an extreme weight loss and necessitated that he consume large quantities of narcotics in an attempt to relieve his pain.

Plaintiff further says that as a result of his injuries, he has suffered and will suffer permanently from pain, great mental anguish, extreme nervousness, an inability to obtain normal rest, weight loss, cosmetic disfigurement, an inability to get about, and extreme worry, grief and anxiety.

Plaintiff further says that his injuries have rendered him an invalid and that he needs constant care and attention to his person.

Plaintiff further says that prior to the foregoing occurrence, he was regularly employed, earning and capable of earning substantial wages but that as a result of his injuries, as aforesaid, he has been rendered totally incapacitated from resuming his railroad occupation or any other gainful occupation which condition will continue into the indefinite future.

By means of and in consequence of which plaintiff has been injured and damaged in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

WHEREFORE, plaintiff prays judgment from the defendant herein in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

A. H. DUDNIK,
MEYER A. COOK,
Attorneys for Plaintiff.

Answer to Amended Petition.

First Defense.

Now comes defendant and for its first separate defense to plaintiff's amended petition admits that it is a railroad corporation organized and existing under the laws of the State of Maryland, and maintains certain tracks in the vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, Ohio; admits that during the month of August, 1954, plaintiff was employed by defendant in the capacities of yard foreman and yard helper, engaged in the movement, switching, and classification of freight cars over certain tracks of defendant located in the City of Cleveland; admits that plaintiff's cause of action is brought under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. §§ 51-59, as amended; and admits that plaintiff's duties as yard foreman and yard helper were in furtherance of interstate commerce.

Not intending to deny that plaintiff may have been required in the course of his duties as yard foreman or yard helper to be present from time to time during the month of August, 1954, at or near the tracks of defendant which are located in the vicinity of Lime Road and the Columbus Road Bridge, or that plaintiff has suffered from a serious and painful disability subsequent to August, 1954, plaintiff does deny for lack of knowledge that there existed at that time a pool of stagnant water or other unsanitary condition for which the defendant was responsible in the vicinity of its tracks at Lime Road and the Columbus Road Bridge; denies that plaintiff's illness or disease was proximately caused or contributed to by the negligence of this defendant, its agents, servants, or employees, either in the respects alleged in the amended petition or in any other manner, and specifically denies

the existence of any connection whatsoever between the condition of defendant's tracks and roadbed and the insect bite allegedly sustained by plaintiff while employed as a yard foreman or yard helper for defendant during the month of August, 1954.

Further answering, defendant says that if it be true that the illness or disease from which plaintiff now suffers was caused or contributed to by an insect bite sustained by him on defendant's premises or elsewhere, the likelihood of harm and consequences to plaintiff therefrom were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose requiring the exercise of care by defendant to protect plaintiff from any such risk, and defendant further says that if it should be found that such risk should have been foreseen by this defendant, no reasonable method or means was available to it which could have eliminated, controlled, or appreciably reduced the numbers or types of insects in and about its premises.

Further answering, defendant denies each and every allegation contained in plaintiff's amended petition save and except those hereinabove expressly admitted to be true.

SECOND DEFENSE.

For its second separate defense to plaintiff's amended petition, defendant incorporates herein by reference and makes a part hereof the preceding portions of this its answer and says that if it should be found that plaintiff's disability was caused in whole or in part by the negligence of this defendant, which defendant specifically denies, then neither said disability nor the insect bite which is claimed to have occasioned it constitutes an "injury"

within the meaning of the Federal Employers' Liability Act, and that plaintiff may not recover in this action.

WHEREFORE, having fully answered, defendant prays that plaintiff's amended petition be dismissed and that it may go hence with its costs without day.

BAKER, HOSTETLER & PATTERSON,
Attorneys for Defendant.

Reply.

For his Reply to the Answer of the defendant to plaintiff's Amended Petition, plaintiff denies each and every fact, statement and allegation contained therein save and except such as are an admission of a fact, statement or allegation contained in the Amended Petition of Plaintiff.

For his further Reply plaintiff re-alleges and re-avers the facts, statements and allegations contained in his Amended Petition, and prays for judgment as in his Amended Petition he has prayed.

A. H. DUDNIK,
Attorney for Plaintiff.

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~765~~ 76

JAMES GALLICK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RAYMOND T. JACKSON,
RUSSELL E. LEASURE,
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-0947

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 765.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED FOR REVIEW.

Petitioner's statement of nine questions presented for review constitutes such a self-serving mixture of unwarranted assumption, argument, and repetition, that it does not permit an orderly answer or discussion.

There are only two basic questions presented for review by this petition, and they are:

1. Did the findings of the jury in its special verdict amount in law to a finding of no actionable negligence, and therefore require judgment for respondent?

(The jury rendered no general verdict.)

2. Were the probative *facts* in evidence sufficient to permit a jury to conclude "with reason" that employer negligence actually played a part in causing petitioner's illness?

STATEMENT OF THE CASE.

A. Introductory.

Petitioner has filed what amounts to a brief on the merits, and we are therefore compelled to do the same since petitioner demands not only allowance of the writ but final relief as well.

B. The Pleadings.

In petitioner's Amended Petition it was alleged that respondent railroad was negligent:

> "4. In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties."

During the trial the court struck specifications number 1, 2, 3 and 5 from the amended petition. (R. 495-7.) The remaining specification of negligence, number 6—charging unhealthful and unsanitary conditions, merely stated an included part of the more general charge of an unsafe place to work. Petitioner then further alleged that "as the direct and proximate result thereof, he was caused to be bitten by an insect which caused his system to become poisoned and which resulted in the formation of deep, acute ulcerations * * * about his extremities and body * * *." (See Petiton for Certiorari, pp. 61-3.)

In its Answer the respondent, after denying both negligence and causation, averred in part:

> "that if it be true that the illness or disease from which plaintiff now suffers was caused or contributed to by an insect bite sustained by him on defendant's premises or elsewhere, the likelihood of harm and consequences to plaintiff therefrom were beyond the realm of reasonable probability or foreseeability, * * *"

This averment was denied by petitioner in his Reply.

C. The Evidence.

Petitioner's statement of evidence is grossly incomplete. Additional important items of evidence are included in the following statement.

On the day in question (some unknown day in August, 1954) the petitioner was walking ahead of his engine along the west side of respondent's single track right of way, where it passed beneath a public street and overhead bridge known as the Columbus Road Bridge, in an industrial area adjacent to downtown Cleveland known as the "flats." The respondent's right of way was approximately 25 feet wide at this point, and was adjoined on both sides, as well as overhead, by property owned and maintained by third parties. Photographs in evidence reveal that bushes and weeds were growing generally in the area, and adjacent to the point where this occurrence allegedly took place.

On the far side of the track from petitioner there was a shallow surface drainage ditch containing a pool of water where dead pigeons, rats and insects had been observed upon occasion. These same conditions had existed for at least 10 years before (R. 99, 154), and there was no evidence whatever of anyone ever having been bitten, having suffered any injury, or having contracted any disease either at or near this location. The only insects that were identified at or near the pool were the usual insects found everywhere in and around Cleveland in August. (R. 253, 557.) The Cuyahoga River nearby carried raw sewage from the entire valley upriver. (R. 666-7, 670, 671.) And in the immediate area were steel mills, a garbage disposal plant, meat packing plants, junk yards, and other industries.

Immediately before proceeding to the point under the

bridge petitioner had been working for 10-15 minutes next to the Cuyahoga River. (R. 143.)

As petitioner stopped for "half a minute" or so under the bridge (R. 144) and at a point at least a track-width removed from the pool, he felt what he described as a "bite" on the back of his left leg just above the knee. He slapped at his pants leg and felt an object about the width of three finger tips beneath his pants leg which he squeezed between his finger tips and his thumb, and the object then dropped down his leg inside his pants leg. *The object was never observed by petitioner or anyone else.* (R. 110-11.)

Subsequently the petitioner developed an ulcer, to wit, an open sore (R. 375), on the back of his left leg above the knee, and in succeeding weeks and months other ulcers appeared on the surface of certain far removed parts of his body where admittedly he was never bitten. (R. 384-5, 392-3.) The ulcers looked like "an open sore from any cause" that later becomes pussy, except only that they grew larger and refused to heal. (R. 374-5, 405-6.) Petitioner's condition has been described variously as "pyoderma gangrenosa" and "chronic ulceration," but these medical terms describe merely the appearance, and not the cause, of his condition. (R. 445, 447.)

The medical cause of all of these ulcers is admittedly *wholly unknown.* (R. 295, 390-1, 445, 447-8, 450, 451, 455, 456, 458, 482.) The ulcers have never been identified medically as being either "bacterial, viral, allergic, malignant or neoplasm" in origin. (R. 447-8.) No bloodstream infection has ever been found to account for the many other ulcers that developed elsewhere on petitioner's body in the ensuing weeks and months, and no causative infection of any kind has ever been found. (R. 385, 455, 482.) Notwithstanding the fact that all known diagnostic tests have been performed, it is still not even known whether the cause

of the ulcers is an infectious disease, i.e., one capable of transmission from outside sources, or a non-infectious disease, i.e., one arising in the petitioner's own body. (R. 295, 447-8, 450, 452, 456, 468, 487.)

The evidence in the record on all the foregoing facts, both negative and positive, is uncontradicted.

D. The Jury's Findings.

No general verdict was returned. Among the jury's findings in the special verdict (consisting of 23 questions and answers in all) were the following:

> "13. Did the defendant B. & O., provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?
>
> "Answer: Jury can't decide on this question.
>
> * * * * *
>
> "20. If the answers to any one of the questions 1, 5, 6, 7, and 8[1] is yes, was there any reason for the defendant B. & O., to anticipate that such would or might probably result in a mishap or an injury?
>
> "Answer: No." (signed by 10 jurors.)
>
> * * * * *
>
> "22. If the answer to Question 21[2] is yes, was it within the realm of reasonable probability or foreseeability of the defendant B. & O. to appreciate this

---

[1] By its answers to questions 1, 5, 6, 7, and 8, the jury had found that: A pool of stagnant water existed under the Columbus Road Bridge (No. 1); dead pigeons accumulated there (No. 5); dead rats accumulated there (No. 6); vermin accumulated there (No. 7); and bugs accumulated there (No. 8).

[2] Question 21 and the jury's answer thereto were:

> "21. Was there a proximate causal relationship to (sic) the stagnant water, the dead pigeons, the insect bite and the present physical condition of the plaintiff?
>
> "Answer: Yes." (signed by 12 jurors.)

proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?

"Answer: No." (signed by 12 jurors.)

It takes only nine jurors to agree on findings in Ohio.

ARGUMENT AND LAW.

Summary.

1. The jury found directly and specifically that the respondent had no reason to anticipate or foresee that a mishap or injury was likely to result from the property conditions existing. This finding amounted in law to a finding of no actionable negligence. And negligence is required under the Federal Employers' Liability Act. In addition, the jury could not agree, and in fact did not find, that respondent had failed to provide petitioner with a safe place to work, which was the sole substantive neglect charged, thus resolving that issue against petitioner who had the burden of proof.

The finding of non-foreseeability, and therefore of no negligence, is overwhelmingly supported, and even compelled as a matter of law, by the uncontroverted evidence here. It is undisputed that the conditions complained of had existed for at least ten years prior to August 1954 without any ill effects of any kind to anyone. And further, there was no evidence whatever: (1) that anyone had ever suffered an injurious insect bite or other injury at or near this pool; or (2) that any recognized insect transmitters of disease indigenous to northern Ohio lived, or were likely to live, in or near this pool; or (3) that any known communicable disease organisms endemic to northern Ohio resided, or were likely to reside, in this pool.

2. Petitioner admittedly had no knowledge of facts which would identify the alleged "biting" object he felt

beneath his pants leg as an insect, as distinguished from some other object, animate or inanimate. There were admittedly no facts presented, scientific or otherwise, to identify the species of the "insect" that "bit" petitioner, and thereby to localize or restrict its likely source. The doctors admittedly do not know the medical cause of petitioner's chronic ulcers—even as to whether they are infectious or non-infectious in origin. From this it is apparent that petitioner's theory of "proof" of causation in this case, to wit, that he was bitten by an insect, that the insect came from this particular pool, and that the insect transmitted an infectious disease from this pool to the petitioner, presents only a pyramid of cumulative assumptions. The probative *facts* in evidence are not sufficient to permit a jury to conclude "with reason" that respondent's premises actually caused petitioner's illness.

A. THE FINDINGS OF THE JURY JUSTIFY FINAL JUDGMENT FOR RESPONDENT.

Petitioner seeks to ignore, and indeed does not even mention, the jury's findings in the special verdict which justify final judgment for respondent. No general verdict was submitted in this case. A special verdict was prepared by the court and submitted to the jury pursuant to Section 2315.15, Revised Code of Ohio.

1. The Jury Refused to Find That the Workplace Was Unsafe, Which Was the Sole Substantive Neglect Charged.

In answer to Question 13 of the special verdict the jury was unable to agree that the all-inclusive allegation of an unsafe place to work had been proved. This amounted to a finding against the party with the burden of proof, i.e., petitioner. *Masters v. New York Central R. Co.*,

147 Ohio St. 293, 298, 70 N. E. 2d 898, cert. den. 331 U. S. 836; *Noseda v. Delmul* (par. 2 of syllabus); 123 Ohio St. 647, 653, 176 N. E. 571; *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211, 217-8; *Chesapeake and Ohio Ry. Co. v. DeAtley*, 241 U. S. 310, 316-7; *Davis v. Louisville and Nashville R. Co.* (App. Ct. of Ind.), 173 N. E. 2d 749, 753, cert. den. on March 19, 1962, Docket No. 688; 38 *American Jurisprudence*, 1095-6 Section 374.

In answer to Question 17, a *testing* interrogatory, the jury expressly did not find that the pool or its contents were unsafe in any way. This too operated as a finding against petitioner on the sole substantive neglect charged. *Masters v. New York Central R. Co., supra,* (147 Ohio St. 293, par. 2 of syllabus); *Gelfand v. Strohecker, Inc.*, 150 F. Supp. 655, 662-3, affirmed 243 F. 2d 797. (Question 17 and the answer thereto appear at page 53 of the Petition for Certiorari herein.)

2. There Was a Direct Finding by the Jury of No Foreseeability of Injury, and Therefore of No Negligence as a Matter of Law.

In answer to Questions 20 and 22 of the special verdict the jury found directly and affirmatively that the defendant had no reason to anticipate or foresee "any mishap or injury" from the property conditions existing (as described and found in the answers to Questions 1, 5, 6, 7 and 8.)

These findings amount in law to a finding of no actionable negligence. *Dalehite v. U. S.*, 346 U. S. 15, 42, 73 S. Ct. 956; *U. S. v. Republic of France*, 5th Cir., 290 F. 2d 395, 399-401, cert. den. Feb. 28, 1962; *Berry, Admx. v. Atlantic C. L. R. Co.*, 273 F. 2d 572, 578, cert. den. 362 U. S. 176; *McKinney v. Appalachian Elec. P. Co.*, 261 F. 2d 292, 295, cert. den. 359 U. S. 926; *Merrill v. Beaute Vues*

Co., 235 F. 2d 893, 896; *Johnson v. Kosmos Cement Co.*, 6th Cir., 64 F. 2d 193, 195, cert. den. 290 U. S. 641; *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928); *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 389, 111 N. E. 1050, 1053; *Hetrick, Admx. v. Marion-Reserve Coal Co.*, 141 Ohio St. 347; *Davis v. Cleveland Ry. Co.*, 135 Ohio St. 401; 2 *Restatement of Torts*, pp. 738, 744-45, 816-18; *Prosser on Torts*, 2d Ed., pp. 121-122, 274-276, 324; 2 *Harper & James, Torts*, pp. 929-30, 1134.

Negligence is required under the Act. And the test of "foreseeable danger," or knowledge of "likelihood of injury," is applied to test a railroad's negligence under the Act, as it is in other negligence cases. *Inman v. Baltimore and Ohio R. Co.*, 361 U. S. 138, 140; *Ringhiser v. Chesapeake & O. R. Co.*, 354 U. S. 901, 903, 905; *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 503; *Brady v. Southern Ry. Co.*, 320 U. S. 476, 483; *Siegrist v. Delaware, etc. R. Co.*, 2d Cir., 263 F. 2d 616, 618-9, cert. den. 360 U. S. 917.

Lack of foreseeability was also pleaded affirmatively in the Answer and denied by the Reply, thus making it one of the issues framed by the pleadings, within the purview of Sections 2315.15 and 2315.16, Revised Code of Ohio, dealing with special verdicts and special interrogatories. Rule 49(a) of the Federal Rules of Civil Procedure would also have required the submission of the issue of "foreseeability" to the jury as part of a special verdict. And by the express terms of Section 2315.17, Revised Code of Ohio, as well as by the terms of Rule 49(b) of the Federal Rules of Civil Procedure, special findings of the jury which are inconsistent with its more general findings in a special verdict control the judgment. (The text of Sections 2315.15 and 2315.17 of the Ohio statutes is not copied correctly in Appendix E of the Petition for Certiorari herein, but is copied correctly in Appendix A of this brief.)

Petitioner has argued below that Question 20 is not clear. This constitutes merely a desperate effort to avoid the clearly intended and twice repeated findings by the jury of no foreseeability of injury in answer to both Questions 20 and 22 of the special verdict.

In the case of *Ringhiser v. Chesapeake & O. R. Co.*, *supra* (354 U. S. 901), at pages 901, 903, and 905, the majority and minority members of this court agreed that the injury suffered by a plaintiff must be "a reasonably foreseeable consequence of the act or omission of the railroad" before liability can be imposed under the Act.

Judgment for respondent was therefore required as a matter of law upon the findings of the jury, and a reversal by the Court of Appeals was mandatory on this independent ground, in addition to those set forth by the Court in its opinion. This is true because it has been the undeviating rule in this Court that a respondent is free to urge affirmance, and this Court is free to affirm, upon any ground which supports the judgment below. *Lagnes v. Green*, 282 U. S. 531, 537-9; *Helvering v. Gowran*, 302 U. S. 238, 245; *Eli Lilly & Co. v. Save-On-Drugs, Inc.*, 366 U. S. 276, 283-4. Consequently, petitioner's strenuous effort throughout his petition to restrict this Court to considering the correctness of the text, and even the language, of the opinion below is unavailing, and he cannot thus prevent the consideration by this Court of the jury's special findings which are fatal to his case.

B. PETITIONER'S THEORY OF CAUSATION, AND THE ABSENCE OF FACTUAL PROOF.

Plaintiff's basic theory of causation is delineated at page 31 of the petition herein, and is as follows:

(1) that it was an "insect" that "bit" him;

(2) that the "insect" that supposedly bit him came from respondent's stagnant pool, as distinguished from other sources; and

(3) that the "insect" transmitted an infectious disease from this pool to petitioner.

We shall refer to the total insufficiencies of petitioner's factual proof in logical order.

We wish to make it clear that we do not intend to attack the credibility of any of the witnesses, nor the weight of any factual testimony. However, it is axiomatic that the admitted ignorance of vital facts is fatal to any ultimate conclusion based thereon.

Considerable quotation of testimony is being undertaken because no printed record is on file.

1. No Factual Proof of an Insect Bite at All.

The only facts on this subject were those provided by the testimony of the petitioner himself, the entire context of which on this subject was as follows:

"Q. Well, when you started to walk, tell court and jury what happened?

A. I was bitten after I took a few, a couple of steps.

* * * * *

Q. How do you know you were bitten?

A. Well, I know I was bit because I slapped my pants leg and crushed it.

Q. What do you *think* you crushed,

A. Well, it was *something*, some *insect*.

Q. Have you any idea as to the size of that insect?

A. Well, it was the width of them three fingers, overlapped, these three fingers.

* * * * *

Q. What happened after you crushed it?

A. I straightened out my leg to make sure, I felt something going down my leg, you know, it would go down.

* * * * *

Q. *Did you see it?*

A. *No, I didn't.*

Q. Have you ever seen it?

A. No, I haven't. (R. 109-111.)

* * * * *

Q. *Did you ever have another bite that felt like this?*

A. Yes—*no, not like this.*

Q. You never did?

A. No." (R. 263.) (Emphasis added.)

At another point petitioner had testified: "I don't know what it was that I felt", in referring to the object he felt beneath his pants leg. (R. 254.)

The petitioner did not testify that he felt any movement which would tend to identify "it" as a living thing. He admittedly never saw "it". In short, he testified to no *facts* whatever that would tend to identify this object as a living thing as distinguished from an inanimate object which would prick or puncture his skin, nor to any facts that would tend to identify it even as an insect as distinguished from some other living thing. It is apparent that the petitioner's conclusion that it was "some insect" that "bit" him is a conclusion *based upon no probative facts whatever within his knowledge*. No other witness, lay or expert, even pretended to testify on this subject. And yet petitioner's entire theory is bottomed upon the initial premise that it was an insect that he felt, and nothing else.

All of the doctors who treated petitioner testified that there was nothing about the lesion on his leg that would tend to identify it medically as an insect bite. (R. 183, 190, 359-60, 481.) An ulcer is merely an open sore (R. 375), and all of his ulcers at the various places on his body had the same general appearance, to wit, that of an open sore from any cause. (R. 384-5, 393, 405-6.)

Petitioner's doctors also testified that any conclusion on their part that his first ulcer was secondary to an "insect bite" at that point was based *entirely* either upon the history of an insect bite given by the petitioner himself, or upon assumption to that effect in the hypothetical question, and was not based upon any medical findings. (R. 405-6, 481, 482, 485-6.)

It is apparent from the foregoing that any ultimate conclusion by the jury that it was an insect that petitioner felt would have to be based upon an admitted ignorance of *facts* necessary to such conclusion.

2. No Factual Proof That the Alleged Biting Insect Came From the Pool in Question.

Petitioner's fact witnesses Molnar and Rady testified only that they had seen wholly undescribed "bugs" around the pool in question during the month of August, 1954. When witness Clason was asked to describe the insects he had seen under the Columbus Road Bridge around the time in question, he stated: "I haven't seen any different insects there than anywhere else, in the flats or in the city for that matter." (R. 557.)

Upon trial, and contrary to a previous negative answer (R. 257-8), petitioner stated that he had seen insects on dead "hides" and on the ground of a size similar to the size of the object he felt within the folds of his pants leg

(R. 255, 257), but he could give no other identifying characteristics. (R. 253, 254.) The petitioner also gave the following significant testimony which accurately summarizes his admitted total ignorance of fact on the subject:

> "Q. It is a fact, isn't it, that you never saw anything under the Columbus Road Bridge, before the insect bite, that looked anything like the one that you felt when you snapped at your pant leg, isn't that so?
>
> A. *I don't know because I don't know what it was that I felt.*" (R. 254.)

In petitioner's brief in the Court of Appeals (at page 74 thereof) his attorneys also made the following significant admission on this subject:

> "* * * there was not one shred of evidence by either plaintiff or defendant which would possibly enable the jury" to identify the alleged insect.

Ignoring for the moment the contrary testimony of petitioner, as well as the obvious difficulty in accurately judging the size of an object through the folds of a pants leg, and taking petitioner's naked conclusion of size alone at face value, a legion of unanswered questions, giving rise to numberless mere possibilities, still remain. How many species of insects are there of this approximate size? Where do they live and breed? Are insects which feed or live on carrion likely to, or are they even equipped to, bite or sting man? Do such insects crawl or fly? Are they capable of crawling up inside a pants leg? Are there any practical means of controlling their number or movement? Petitioner's case is entirely silent on these points, and petitioner called no entomologist as a witness. The common experience of jurors can scarcely be relied upon to fill the void, where the species itself is admittedly unknown.

Despite petitioner's claim to the contrary (pages 16-17 of the Petition herein) there was no evidence whatever that it was *only* on carrion that insects of the size of this object were to be found. The record contains no such limiting evidence, and common knowledge dictates that bumble bees, wasps, and grasshoppers, to name but a few, are insects of similar size prevalent in such a neighborhood in August, and that none of these is attracted by carrion.

It is also common knowledge, and therefore judicially noticeable, that there are "from two to four million different species of insects" known to exist—a "vast number" of which "only exist in conjunction with vegetation"; also, that there are "from 500 to 2,000 insects in and on a square yard of rich, moist soil," and "roughly 4,000,000 insects exist on one moist acre." (12 *Enc. Brit.*, 1960, pp. 395 *et seq.*; 12 *Enc. Brit.*, 1941, 405-422.) There are likewise over one million known *species* of six-legged insects alone, which include all large sizes and kinds of beetles, wasps, bees, flies, and the like, some of which bite man and some of which do not. (177 *Jour. Am. Med. Assn.*, p. 505, 1961.)

When Dr. Stearns, the only entomologist called, was examined on the subject his *unrebutted scientific testimony was that the only insects that bite humans that would be attracted by, or live in, this pool or its contents are mosquitoes.* (R. 631.) He further testified that the only insect in this part of the country near the size of the object felt by petitioner that is known to attack man, is the horse fly, but that this insect would *not* be attracted by the conditions complained of here. (R. 631-2.) Giant water bugs, which are attracted by street lights at night, would *not* live in a stagnant drainage pool, and they are *not* attracted by humans. (R. 662.) He further testified that the only sizeable insects attracted by dead animal bodies are certain kinds of

burying beetles, *but that these do not bite or sting man.* (R. 660-1.)

Even if Dr. Stearns' uncontradicted scientific testimony is given no effect, any ultimate conclusion that a *biting* insect came from respondent's pool, as distinguished from other sources, must be based upon pure guess by choosing among literally thousands of mere possibilities concerning the millions of species of insects, and not upon any probative *facts* in the record, nor upon any scientific knowledge whatever.

Although Drs. Ippolito and Anderson, petitioner's medical witnesses, both admittedly reasoned, in order to answer a hypothetical question, that the assumed but wholly unidentified "insect" of the size described, more probably came from the pool than from any other source, yet both *admitted that they had no specialized knowledge whatever of insects or their habits.*

Dr. Ippolito testified on this subject as follows:

"Q. Now, on the subject of insects, do you hold yourself out as a specialist in that field.

A. No, sir.

Q. I take it you do not have any specialized knowledge as to the particular kinds of insects, of their *nature*, their *habits* and so forth?

A. No, sir, I do not.

Q. Do you know of *any* insect in this area of the country that *measures about one-half inch by two inches* that is known to attack human beings?

A. *As I mentioned before, I am not a specialist in insects. Therefore, I can't answer that.*" (R. 356.)

* * * * *

"Q. Doctor, in the hypothetical question given you by Mr. Dudnik, there was no identity of the kind of insect, was there?

A. No, not the identity of it.

Q. As to type or species?

A. Right.

Q. You don't know medically, do you, what kind or type of insects may have bitten Mr. Gallick?

A. Not what type or what species or what family, no, sir." (R. 400.) (Emphasis added.)

Dr. Anderson likewise repeatedly disclaimed any specialized knowledge on the subject (R. 463, 466, 479, 481-2), and testified, in part:

"Q. Doctor, do you have any specialized knowledge of the habits of insects?

A. No, I do not, sir." (R. 463.)

* * * * *

"Q. Do you know of any insect that is a half-inch in diameter and two inches long (the size assumed in the hypothetical question) that is known to attack man?

A. Not specifically, sir, no.

Q. *I take it, then, you have no ideas as to what the habits of such an insect, if it exists, might be?*

A. *No, sir, I do not.*" (R. 479.) (Emphasis added.)

The foregoing admissions of ignorance of fact and of lack of specialized knowledge, render the doctors' opinions as to the probable source of an insect of this size, legally incompetent and without weight. *Rhodes v. U. S.*, 4th Cir., 282 F. 2d 59, 61, 62 (1960); *Atlantic Life Ins. Co. v. Vaughan*, 6th Cir., 71 F. 2d 394, 395-6, cert. den. 293 U. S. 589; *Olsen v. Electric Auto-Lite Co.*, 164 Ohio St. 283, 284; 130 N. E. 2d 363; *Burens v. Industrial Commission*, 162 Ohio St. 549, 553-5; 124 N. E. 2d 724; *Moore v. State*, 17 Ohio St. 521; 66 *A. L. R.* 2d, 1086-7.

Another independent but vital question is: *When* did the supposed insect get onto the petitioner? Once again the record is barren of any relevant probative fact, and

any answer is left to pure guess. It is uncontradicted, however, that petitioner had been standing for only a matter of about 30 to 45 seconds near the pool before the "bite"; that the object at that time was up inside his pants leg to a point above his knee; that immediately prior thereto the petitioner had been at a point adjacent to the Cuyahoga River for approximately 15 minutes, and had walked directly from there to the point under the bridge; and that the petitioner never felt anything crawling or moving inside his pants leg. The only expert (Dr. Stearns) testified uncontradictedly that it would take any insect of the size of the object felt by petitioner, at least several minutes (5 to 10) to get from his ankle up inside his pants leg to a point above his knee. (R. 635.)

Certainly common knowledge cannot suffice where the species of insect is admittedly unknown. Any conclusion then as to *when* the supposed insect got upon petitioner must also rest upon pure guess, *i.e.*, total ignorance of any probative facts.

3. No Factual Proof That the Pool In Question Was the Source of Petitioner's Illness.

There was no factual proof that this pool was the source of petitioner's numerous ulcers for one very basic reason: The medical cause of his ulcers has admittedly never been determined. It is not known by the medical profession whether the ulcers are of "bacteriologic, viral, allergic, malignant, or neoplasma origin." (R. 448.) In short, the cause is a medical enigma insofar as any known medical facts are concerned. (R. 456.)

In the weeks and months following petitioner's first ulcer, additional red swellings started to appear on distant parts of the body, where petitioner concededly had never been bitten by an insect. (R. 384-5, 392-3, 405-6.) These

swellings also broke down and became open sores. (R. 384, 385, 393.) Repeated cultures and tests, including blood cultures, have never revealed any causative infection or possible means of transmission from one site to another. (R. 386-9, 395, 452, 454-6.)

The first doctor to see petitioner described a "boil-like" lesion on his left leg, and testified that a boil is caused by staphylococcus, a kind of bacteria commonly found in the air and on all surfaces including a person's skin. (R. 178-9, 181-2, 184, 191, 193.) But the first smear ever taken from the first lesion revealed no staphylococcus, nor any other causative organisms. (R. 295, 386-7, 392-4, 407.) The fact that varying non-specific infections were later found in the ulcers admittedly does not indicate an infectious cause, because ulcers caused by non-infectious diseases, such as diabetes, all become chronically infected *after* they become open sores, due to the entry of ordinary surface and air contaminants. (R. 374-5, 452, 456.)

Dr. Ippolito summarized petitioner's condition after the months spent in Marymount Hospital as follows:

> "The patient * * * has had a lengthy hospitalization here as a result of multiple ulcerations of the skin due to pyoderma gangrenosa, *specific etiology unknown*." (R. 295.) (Emphasis added.)
>
> * * * * *
>
> "Q. Etiology means what, doctor?
>
> A. Etiology means the specific cause of a condition." (R. 390-1.)

The meaning of the terms "pyoderma gangrenosa" and "etiology" was further stated by Dr. Anderson, as follows:

> "Q. Will you tell us the meaning of the medical term *pyoderma-gangrenosa*?
>
> A. Yes, sir. It is a descriptive term and *only a descriptive term*.

Q. By that you mean what?

A. It describes three things. Pyo means pus. Derma means skin. And gangrenosa means necrosis.

Q. But the term *pyoderma-gangrenosa does not include a description or reference to any cause?*

A. *No, it does not.*" (R. 445.)

* * * * *

"Q. What is the definition of the word *etiology*, Doctor?

A. *Cause.*" (R. 458.) (Emphasis added.)

Dr. Anderson also testified as follows:

"Q. Doctor, at the time of Mr. Gallick's final release from the hospital [Cleveland Clinic], which I think you told us was perhaps last July [1958], at the time he was taken from your hospital out to Highland View, was there a diagnosis entered?

A. This same diagnosis.

Q. What was that?

A. *Chronic ulceration.*

Q. Chronic ulceration.

A. Yes.

Q. *Once again, just a descriptive term?*

A. *Yes.*" (R. 447.)

* * * * *

"Q. It does not relate to the cause, the basic cause?

A. It doesn't relate to the bacterial cause or the viral cause, no.

Q. Or some other cause if another cause exists?

A. Of the immediate cause. In terms of organism, no.

Q. *Now, all the time that he was there at the Cleveland Clinic, Doctor, did you ever determine the basic cause of Mr. Gallick's condition?*

A. You mean in terms of this organism that we are talking about?

Q. Well, do you know that we are talking about an organism, or is that theoretical?

A. For the moment it is *theoretical. I don't know what the immediate cause was.*

Q. All right. In other words, after *two years* at the Cleveland Clinic the folks out there still did not determine the immediate cause of his condition?

A. *We found no bacteriologic or viral, allergic, malignant, neoplasma origin for his ulcers.*" (R. 447-8.)

* * * * *

Q. "Now, you mentioned bacteria and virus. There are *other things,* too are there not, such as allergy, sensitivities, systemic disease, or conditions?

A. Yes, sir. We reviewed every one of those.

Q. You just didn't find the answer any place here, did you?

A. Not in terms of what you mentioned, no, sir.

Q. *So you still don't know why his ulcers didn't heal up and you don't know why new ones developed, do you?*

A. *This is correct.*

Q. And that is after two years of study out there at your hospital?

A. Yes, sir." (R. 450.)

* * * * *

"Q. And having made a *differential diagnosis,* you still have not been able to determine the—I want to get the right word, I don't want you to quarrel with me—I think you used the word immediate, the producing cause of these ulcers?

A. The immediate producing cause, yes.

Q. And their failure to heal?

A. Yes." (R. 451.)

* * * * *

"Q. *So you still after all these studies are not able to tell us the immediate cause of his condition?*

A. *Very true.*" (R. 455.)

* * * * *

"Q. Well, let me ask you this, Doctor: Don't we

have ulcers developing, let's say, in *diabetes*?

A. Yes, sir, and *they all become chronically infected*." (R. 452.)

* * * * *

"Q. And if his ulcers are caused by a systemic disease or allergy, they would still be infected, wouldn't they?

A. I would think so, yes."

* * * * *

"Q. *Until you find the specific and immediate cause you can't really rule out anything, can you?*

A. *Not a single thing.*" (R. 456.)

Petitioner puts great emphasis upon Dr. Davis' testimony to the effect that an insect bite is a trauma, and that trauma "can" cause "pyoderma gangrenosa." By definition this means only that trauma "can" cause a pussy skin ulcer. Any schoolboy with a pussy skinned knee knows this. (R. 405-6.) But this provides no evidence of the medical cause of petitioner's numerous ulcers, as petitioner's own doctors admit.

With the medical cause of petitioner's illness being wholly unknown, and in the absence of any knowledge that it is a communicable disease at all, its reservoirs, if any, are not determinable. Therefore, it cannot be concluded with reason that the pool in question was the source of petitioner's illness.

C. THE JUDICIAL TEST TO BE APPLIED TO THE EVIDENCE.

In the case of *Rogers v. Missouri Pacific R. Co.*, *supra* (352 U. S. 500, 77 S. Ct. 443), and the decisions following it, including the *Inman* case, *supra* (361 U. S. 138), and the case of *New York, New Haven & Hartford Co. v. Henagan*, 364 U. S. 441, 81 S. Ct. 198 (1960), this Court has defined the required minimum proof to take a plaintiff's F. E. L. A.

case to the jury. In the *Rogers* case, at pages 506-7, the test is stated:

> "Under this statute the *test* of a jury case is simply whether the proofs justify *with reason* the conclusion that employer *negligence* played any part, even the slightest, in *producing* the injury or death for which damages are sought. * * * *Judges* are to fix their sights primarily to make that appraisal and, *if that test is met*, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of *other probabilities*." (Emphasis added.)

At page 19 of his petition petitioner very misleadingly quotes as a complete sentence only a *fragment* of a sentence appearing on page 653 of *Lavender v. Kurn*, 327 U. S. 645, dealing with the role of speculation and conjecture under certain conditions. Petitioner then seeks to draw the conclusion therefrom that speculation and conjecture alone are a sufficient foundation for liability. But this is obviously not the law and never has been, because the opinion in *Lavender* then immediately goes on to state that "when there is a complete absence of probative facts to support the conclusion reached," it is error to submit the case to the jury.

Under the *Rogers* rule the judicial test covers not only the subject of negligence, but also the question of whether negligence played a part in *producing* the injury complained of. Thus petitioner's argument that a verdict may not be directed upon a judicial determination of lack of proof of causation, as distinguished from negligence, is also not valid.

D. THE LEGAL INSUFFICIENCY OF THE EVIDENCE.

The Court of Appeals in the instant case was careful to recognize and apply the standards of the *Rogers* case. It recognized that the usual concept of proximate cause, as it is known in Ohio, is not to be applied here; that a "liberal attitude" must be adopted with respect to the legal sufficiency of the evidence; and that proof may "rest upon inferences to be drawn from the evidence." But the Court also recognized, and correctly so, that the Act does not make the employer an insurer; that "there must be proof of some causal relationship between employer negligence and the injury for death of the workman" before a jury case is made out; and that "there may be evidence which does not amount to proof." After reviewing the evidence as well as the lack of evidence of probative facts in the instant record, the appellate court then concluded:

> "Throughout all the cases involving employer liability, in cases such as we have before us, the United States Supreme Court has held that a right to recover is established if, from the facts proved, negligence and its causal relationship to the injury and damage may reasonably be inferred; a jury question is presented if, with reason, 'the conclusion may be drawn that negligence of the employer played any part at all in the injury.'
>
> * * * * *
>
> "* * * When there is neither direct evidence, nor reasonable inferences to be drawn from evidence, whether direct or circumstantial, a conclusion based upon such absence of evidence or reasonable inference is mere conjecture, and the drawing of a further inference from conjecture does not amount to proof. In proving a defendant's culpability, the proof must show that the tort is distinctly traceable as one of the efficient antecedents of the damages, and has a share in subjecting plaintiff to injury.
>
> * * * * *

"If the plaintiff's case is to be sustained, we must infer that this undescribed (except as to size and biting qualities) insect or bug had been attracted to the area in which the plaintiff was hurt by the stagnant pool, and that its bite caused the plaintiff's condition; that the pool created conditions and influences which helped to incubate or furnish an environment for the bug, whose bite was poisonous to the plaintiff; or, that the insect, having traveled from other areas, became contaminated or infected by the pool with a substance injurious to man, and that this substance infected the plaintiff when bitten.

"The law is plain that, before the question of causation can be submitted to a jury, the trial judge must decide a preliminary question—*i.e.*, whether from the evidence a jury could reasonably find the existence of a causal relation. If the judge decides in the affirmative, it will then be for the jury to say whether they do find. In other words, the judge must say whether on the evidence, a causal relation may be reasonably inferred. If the judge rules that it may be so inferred, the jurors then must say whether, from the evidence, the causal relation is inferred by them.

"The question of causation should not get to the jury, and the judge should direct a verdict for the defendant, unless the court is of the opinion that a jury can reasonably find that the defendant's tort was an efficient cause of the damage to the plaintiff *and not a mere antecedent fact.*

"As we view the record before us, we have a chain of possibilities that the negligence of the defendant might have shared in subjecting the plaintiff to damage and injury, but the proof of a legal causal connection between the negligence and damage falls short of that required for the consideration of a jury.

* * * * *

"We determine, therefore, that, where there is, as here, only a guess or speculation of a causal connection between the negligence of the employer and the

injury of an employee, no liability attaches, and a judgment based upon such speculation cannot be sustained." (Emphasis the court's; pp. 43-5 of Petition for Certiorari.)

Petitioner sets up a straw man by attempting to distinguish between a requirement of merely "some connection" between negligence and injury, as urged in the petition, and the requirement that negligence be "an efficient cause" of the injury, as stated in the appellate opinion. The petitioner takes words out of context and then seeks to draw an unwarranted conclusion. The full context of the appellate court's statement is as follows:

> "The question of causation should not get to the jury, and the judge should direct a verdict for the defendant, unless the court is of the opinion that a jury can reasonably find that the defendant's tort was an efficient cause of the damage to the plaintiff *and not a mere antecedent fact.*"

The adjective "efficient" means "effectual," which in turn means: "producing, or capable of producing." *The American College Dictionary*, Random House, 1954.

The court merely said that although the pool and contents existed, the probative facts in evidence did not justify "with reason" the conclusion that said conditions actually played a part in producing petitioner's illness. Thus the court correctly followed and applied the *Rogers* rule.

E. CASES CITED BY PETITIONER ON SUFFICIENCY OF PROOF DISTINGUISHED.

Petitioner cites numerous decisions in support of his claim that his purported proof of negligence and causation is legally sufficient upon judicial appraisal. In none of these cases are the facts similar to those in the case at bar.

The proof in each of the cases cited by petitioner was

clearly more substantial than the premises of total ignorance presented by the evidence in the case at bar. Also, in each of those cases there was direct evidence of the specific cause of the plaintiff's injury or death. In *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, the plaintiff was injured when he fell from the defendant's trestle where he was required to work with unsafe footing. In *Davis v. Virginia Rwy. Co.*, 361 U. S. 354, 356, plaintiff was injured when he fell from the top of a boxcar where he was required to be due to the assignment of an inexperienced helper on a "rush" job. In *Gibson v. Thompson*, 355 U. S. 18, the plaintiff was injured when he fell on loose gravel in the yard of the railroad. In *Harris v. Pennsylvania R. Co.*, 361 U. S. 15, the plaintiff was injured when he fell on a slippery tie. In *Lavender v. Kurn*, 327 U. S. 645, the plaintiff was killed by receiving a blow to the head, and the resultant hole fit a loose hook swinging from the side of a boxcar operated by the defendant at the point of the accident. In *McBride v. Toledo-Terminal R. Co.*, 354 U. S. 517, the plaintiff lost his footing and fell on a boxcar due to insufficient lighting in the defendant's yard. In *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, a defective wrench supplied by defendant fell and smashed plaintiff's foot weakened by pre-existing Buerger's disease. In *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, the plaintiff was injured when he fell from a culvert of defendant. In *Schultz v. Pennsylvania R. Co.*, 350 U. S. 523, 525, the decedent died from drowning when he fell from defendant's tugboat which was "dark, icy and unmanned." In *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 110, the plaintiff was injured when he fell on defendant's pitching deck and, according to "direct medical testimony," his "latent tubercular condition actually was activated by the

trauma complained of." In *Stinson v. Atlantic Coastline R. Co.*, (88 So. 2d 189, 191), 355 U. S. 62, the engineer had been killed by being struck and his body dragged and severed by a heavy object running over it on defendant's track where defendant's locomotive and work train had been negligently operated shortly before; parts of decedent's stomach and lungs were found on the wheels of one of the cars of said train. The facts in *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, are substantially the same as in the *Stinson* case; there was no doubt but that he was killed by being run over by defendant's engine which had failed to ring its bell.

Petitioner seeks to distinguish the *Inman* and *Henagan* cases, *supra* (361 U. S. 138 and 364 U. S. 441 respectively) by stating that in those cases the injuries were caused by a third party over whom the railroad had no right of direction, and thus that the injury was not caused by employer negligence but by the actions of the third party. Of course the negligence claimed in those cases (unsafe crossing in *Inman* and a negligent failure to apply brakes in time in *Henagan*) does not permit such a simple rationale. But even this attempted distinction is not valid because in the case at bar it was an assumed wild insect which "bit" petitioner, and the possession of land does not carry with it the possession of, nor the legal responsibility for, indigenous wild insects which may be upon it. 3 *Restatement of Torts*, p. 12, Comment (a); p. 18, Comment a.

In each of the foregoing cases cited by petitioner this Court held that there were probative facts from which the jury could have found "with reason" that employer negligence actually produced the injury or death complained of. But in the case at bar the very cause of petitioner's illness (chronic skin ulcers) is wholly unknown. It is admittedly not known that the basic cause is a communi-

cable disease at all, thus leaving a complete and admitted hiatus between the alleged negligence and the "injury." And a jury cannot supply medical facts, nor "with reason" reach a medical conclusion in the absence of facts.

CONCLUSION.

In the case at bar, as in the *Inman* case, *supra*, the alleged unsafe condition had existed for at least 10 years with no known injury or mishap to anyone. There was also no proof that any known disease-bearing insects frequented the pool, nor that any known communicable disease endemic to Ohio was present in the pool. It is also admittedly not known that the cause of petitioner's illness (chronic skin ulcers) is a communicable disease at all. There is a complete absence of probative facts to support a conclusion with reason that employer negligence played a part in producing petitioner's illness. The Court of Appeals therefore was correct in concluding that a directed verdict was mandatory under the *Rogers* standard.

The jury failed and refused to find that the workplace was unsafe, which was the sole substantive neglect charged. There was also a direct finding by the jury of no foreseeability of injury, and therefore of no negligence as a matter of law. These findings of the jury entitled respondent to final judgment as ordered by the appellate court.

It appears that the judgment of the Court of Appeals is in accord with the applicable decisions of this Court, and the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Statutes Involved.

Ohio Revised Code, Section 2315.15.

When requested by either party, the court shall submit in writing each determinative issue to be tried by the jury and direct the jury to give a special verdict.

Ohio Revised Code, Section 2315.16.

When either party requests it, the court shall instruct the jurors, if they render a general or special verdict, specially to find upon particular material allegations contained in the pleadings controverted by an adverse party, and submitted by the court in writing to the jury, and shall direct the jury to return a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk.

Ohio Revised Code, Section 2315.17.

When a special finding under Section 2315.16 of the Revised Code is inconsistent with the verdict, the former shall control the latter, and the court may give judgment accordingly.

APPENDIX B.

Federal Rules of Civil Procedure Involved.

Rule 49.

SPECIAL VERDICTS AND INTERROGATORIES.

(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) *General Verdict Accompanied by Answer to Interrogatories.* The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render

a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. [illegible].

JAMES GALLICK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,
Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 765.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT.

INTRODUCTORY.

The petition for writ of certiorari was directed primarily to the issue of whether the proofs were such as to entitle respondent to final judgment *on a directed verdict*. This was the *sole* basis of the judgment of the Court of Appeals for Cuyahoga County in reversing the judgment of the trial court for petitioner entered upon the special verdict of the jury. Much of respondent's brief opposing this petition for a writ of certiorari is directed to the proposition that the special findings *by the jury* were such as to entitle respondent to judgment as a matter of law. Inasmuch as the Court of Appeals for Cuyahoga County specifically reviewed all claims of error by respondent pertaining to the findings of the jury and found none prejudicial to the rights of respondent, this issue was not discussed in the petition for a writ to this Court. Petitioner now feels impelled to briefly take issue with certain propositions being advanced by respondent in the instant cause.

THE EVIDENCE.

Contrary to the assertion of respondent (Page 3 of its brief), the unsanitary condition complained of forming the basis of petitioner's cause of action was not that the dead pigeons, rats and insects had been observed *upon occasion*. There was an abundance of evidence that the presence of dead pigeons, rats and insects in and about the pool of water was a constant, continuous, recurring condition which respondent's maintenance department failed to correct despite complaints of the same (R. 23, R. 24, R. 44, R. 51, R. 52, R. 99).

While petitioner readily admitted that he never visually observed the insect which bit him, there was an abundance of circumstantial evidence to conclude that he was in fact bitten by an insect while performing occupational duties for respondent opposite this cesspool complained of. The lesion had the feel of a bite (R. 109). The object crushed had the feel of an insect (R. 110). There was immediate pain at the site of the bite (R. 111). The welt had the look of a bite (R. 64). Insects were seen on the ground at the cesspool of the approximate size which petitioner felt in his pants leg (R. 257). On November 2, 1954, when visited by respondent's claim agent in the hospital, petitioner made out a Form 790 accident report which refers to the cause of injury as "insect bite back of left leg at knee joint." (R. 265, 266.) The admitting histories at both Marymount Hospital and Cleveland Clinic Hospital which are part of the record refer to an insect bite at work. The jury specifically found that petitioner was bitten by an insect while performing his usual and customary work duties near or about the Columbus Road Bridge (See Page 51, Petition for Writ of Certiorari, Exhibits J, K, and L). Even the Court of Appeals for Cuyahoga County was satisfied that there was ample proof

of the bite as claimed. Thus, the following is from the opinion of that court (p. 42, pet. for writ):

> "We have sufficient credible evidence to conclude, *as did the jury*, that Mr. Gallick suffered a 'bite' on railroad property by some insect while working for that railroad. We have an abundance of testimony that from such 'bite' severe consequences to Mr. Gallick have ensued." (Emphasis added.)

Respondent makes much of the evidence that the precise medical etiology of all of these ulcers has never been identified (Page 4, respondent's brief). However, the record abounds with testimony that the physicians, specifically Drs. Ippolito and Anderson, who treated petitioner for many years for the illness involved, never questioned that the etiology was connected to the unsanitary cesspool maintained by defendant and resulted from the insect bite. When first examined by Dr. Ippolito on September 16, 1954, there was only the one lesion in back of the knee (R. 282, 283). All systemic diseases and infections which might cause such lesions, but be unrelated to such an insect bite, were ruled out by careful diagnostic tests (R. 285, 286). Dr. Ippolito testified that bacteria was introduced into this man's body from the insect bite, the insect itself having become infected first (R. 396, 397). As stated by Dr. Robin Anderson of the Cleveland Clinic on cross examination by respondent's counsel (R. 448):

> "Q. In other words, you found no medical explanation for his ulcers?
>
> A. Medical, again, from the standpoint of immediate cause. We still felt that it was on the basis of an insect bite."

ARGUMENT AND LAW.

1. Did the jury refuse to find that the work place was unsafe?

Respondent takes the position that the failure of the jury to answer question 13 of the special verdict (Ex. M, p. 52, pet. for writ) amounts to a finding as a matter of law against petitioner on the issue of unsafe place to work. This is exactly the issue that was before this Court in the case of *Harris v. Pennsylvania Railroad Company*, 361 U. S. 15 (1959) reversing 168 Oh. St. 582 (1959). Thus in *Harris*, although one of the specifications of negligence submitted to the jury for consideration was the failure of the railroad to furnish the petitioner a reasonably safe place in which to work, the jury, while finding specific negligence, failed to include a specific finding that the place of work was unsafe. The Supreme Court of Ohio took the position that the specific finding by the jury was insufficient to sustain petitioner's judgment. The court then held that the failure of the jury to find other negligence in answer to the special interrogatories was the equivalent of a finding against petitioner on these issues, relying upon *Masters v. New York Central Railroad Company*, 147 Oh. St. 293 (1947), certiorari denied 331 U. S. 836, rehearing denied, 332 U. S. 786. This Court flatly rejected such reasoning.

This Court has repeatedly held in actions under the Federal Employers Liability Act that a reviewing court must search the record and give weight to the factors and circumstances as a whole. *Union Pacific Company v. Hadley*, 246 U. S. 330 (1918); *Blair v. B. & O. Railway Company*, 323 U. S. 600 (1945). Further, this Court has held that where the jury rejects all specific claims of negligence but nevertheless finds generally negligence from the record, the same may be sufficient to support a verdict for the

petitioner. *Panhandle and Santa Fe Railroad Company v. Arnold*, 353 U. S. 360 (1957).

In the instant case, the jury did find specific negligence consisting of "permitting the existence of a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs and vermin." (Page 53 Petition for Writ of Certiorari, Exhibit Q.)

2. Was the failure of the jury to answer the questions on special verdict pertaining to foreseeability of injury the equivalent of a finding of no negligence as a matter of law?

Respondent vigorously pressed this point in its appeal to the Court of Appeals for Cuyahoga County and in its cross-motion to certify to the Supreme Court of Ohio. At best, however, this issue raises questions of Ohio procedural law as to the rendering of final judgment upon findings of fact by the jury. See Ohio Revised Code, Section 2315.17 (Page 30 respondent's brief).

As already noted in the original petition for writ of certiorari, the jury did find specific negligence and a proximate relationship between this negligence and petitioner's injury. Under Ohio law the question becomes one of whether the findings by the jury are inconsistent with the judgment for petitioner as rendered by the trial court, Ohio Revised Code, Section 2315.17. This question of Ohio law was carefully considered by the Court of Appeals for Cuyahoga County in its published opinion (Pages 38 and 39, Petition for Writ of Certiorari). Under Ohio law it is very clear that such answers of fact by the jury must be liberally construed to conform with the intent of the jury, *Klever v. Reid Brothers Express, Inc.*, 151 Oh. St. 467 (1949); *Elio v. Akron Transportation Company*, 147 Oh.

St. 293 (1947). The federal view is substantially the same. See *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., and The City Line, Ltd.*, No. 282, October Term, 1961, decided April 2, 1962, page 9:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360. Cf. *Dick v. New York Life Ins. Co.*, 359 U. S. 437, 446."

Respondent makes much of the fact that throughout the years that the cesspool existed no disease or injury was known to have occurred to any of its employees. It is clear, however, under the Federal Employers Liability Act that such will not exculpate respondent from liability, but at best is merely a circumstance for the jury to consider as evidence. *Chicago, Rock Island and Pacific Railway Company v. Lint*, 217 F. 2d 279 (1954). Likewise, the mere fact that the railroad maintained such right of way in accordance with its usual custom and practice will not serve to condone negligent conduct. *Urie v. Thompson*, 337 U. S. 163 (1949).

In the instant cause, the jury did find specific negligence as already alluded to, and further found such negligence to bear a proximate relationship with the resulting injuries and disabilities suffered by petitioner. The fact that the jury failed and neglected to attach to these findings the legalistic label of foreseeability would clearly, therefore, under the applicable authorities, not serve as a basis to deny petitioner his judgment where the findings as a whole are sufficient to support such a judgment and there is an evidentiary basis for same in the record.

Furthermore, it is questionable as to whether the so-called issue of foreseeabiilty is a determinative issue at all under the Ohio Special Verdict Statute, Ohio Revised Code, Section 2315.15 (Page 30 respondent's brief). Subsequent to the decision of the Court of Appeals for Cuyahoga County in the instant case, the Supreme Court of Ohio rendered its opinion in the case of *Miller v. McAllister*, 169 Oh. St. 487 (1959). The opinion in that cause sets forth a legally sufficient special verdict under Ohio Revised Code, Section 2315.15. From that opinion it seems quite clear that the *determinative* issue here is negligence. Exhibit P, Page 87, Petition for Writ of Certiorari, discloses that the jury specifically found the defendant "negligent in one or more of the particulars alleged in the petition," thus resolving this fundamental determinative issue in favor of petitioner.

CONCLUSION.

Examination of the record reveals a multiplicity of circumstances and probative facts to support the findings of the jury of specific negligence and a proximate relationship between same and the ultimate injuries of petitioner. Judgment for petitioner was rendered upon the special verdict of the jury by the trial court. Respondent itself seems to have grave doubts as to the propriety of the Court of Appeals for Cuyahoga County in reversing this judgment of the Trial Court and holding that no actionable case for submission to the jury was presented by the proofs. This is self evident from the brief of respondent which is devoted in great extent to attempting to reconcile the entry of final judgment in its favor by the Court of Appeals on the basis of the findings by the jury. However the opinion of the Court of Appeals makes it clear that its judgment is one of law as upon a directed verdict and not upon

the verdict of the jury. The weakness of respondent's position is manifest by the fact that on the truly determinative issues the jury did in fact find for the petitioner. The trial judge upon reviewing all of the special findings upon the special verdict of the jury, found the same sufficient under Ohio Law to entitle petitioner to judgment.

Respondent makes much of the testimony of its entomologist, a Dr. Stearns, who was flown in by respondent to testify upon a hypothetical basis from his home in Newark, Delaware, far removed from the scene of the occurrence (R. 626). Dr. Stearns admittedly had never visited the scene of the occurrence until a day or so before he testified, which was many years after it had occurred (R. 629). Many factors were brought out on cross-examination which would entitle the jury to completely disregard the testimony of Dr. Stearns. Clearly his credibility was solely one for the jury to pass upon.

Likewise, respondent again attempts to open for review before this court the procedural question of the form and adequacy of the hypothetical questions put before Drs. Ippolito and Anderson by petitioner in the trial court. These questions involve considerations of Ohio law, which were extensively briefed in the Court of Appeals for Cuyahoga County as well as in the Supreme Court of Ohio on the various motions to certify before that court. Again, the Court of Appeals for Cuyahoga County found no error prejudicial to respondent in these respects. Again, the record abounds with testimony by both doctors, who were vigorously cross-examined as to their basis for reaching their conclusions of a direct and proximate relationship between the condition in the cesspool and the disease with which petitioner is afflicted.

Respondent attempts to make much of the fact that the alleged insect was never identified so that no adequate

means was present from the record to ascertain its capabilities of producing the lesions complained of. Respondent even refers to petitioner's brief in the Court of Appeals where petitioner readily admitted that there was no evidence which would possibly enable the jury to identify the alleged insect. (See Page 14 respondent's brief). Respondent, however does not quote the immediately following sentence in the same brief, which is as follows:

> "Plaintiff (petitioner herein) has always contended that the identity of the particular insect is unnecessary anyhow since the negligence charged was not in having the insect as such, but in having the unsanitary conditions which infected plaintiff with his disease process."

As already reiterated many times, it is petitioner's fundamental theory of the case that one of the various insects feeding upon the putrid matter maintained by respondent in its cesspool transmitted a disease process to the body of petitioner, which has lead to his present physical condition of complete dependency and helplessness with constant and continuous hospital confinement.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 76.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO,
EIGHTH JUDICIAL DISTRICT OF OHIO.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

OPINIONS BY COURTS BELOW.

The Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, in Cases Nos. 25017 and 25087 consolidated, entitled *James Gallick v. The Baltimore and Ohio Railroad Co.*, rendered its judgment and decision reversing the judgment of the trial court in favor of Petitioner upon the special verdict of the jury. The opinion of the Court of Appeals dated March 23, 1961, is reported in 86 Oh. L. Abs. 1, 176 N. E. 2d 382 (1961), (R. 618-628). The judgment journal entry of the Court of Appeals dated April 11, 1961 is found on pages 629 and 630 of the Record. The judgment of the Court of Appeals reversed a judgment in favor of the petitioner herein which had been entered in his favor in the sum of Six Hundred

Twenty-five Thousand Dollars ($625,000.00) upon the special verdict of the jury by the Court of Common Pleas of Cuyahoga County, Ohio. The journal entry of judgment in favor of petitioner by the Court of Common Pleas of Cuyahoga County, which incorporates as part of said journal entry the special verdict of the jury, is on pages 6 through 14 of the the Record. The judgment of the Court of Appeals which reversed the judgment of the Court of Common Pleas in favor of petitioner, and instead entered final judgment for respondent, was bottomed on the single proposition that petitioner's proofs of causal connection fell short of the degree of proof on that issue required by law, hence the trial court erred in not directing a verdict at the conclusion of all of the evidence in favor of respondent, or in the alternative in not entering judgment for respondent notwithstanding the verdict of the jury. (R. 629 shows the two grounds of judgment of the Court of Appeals.) *It is important to here note that the Court of Appeals in its journal entry did not find error in the refusal of the trial court to enter judgment for Respondent upon the special verdict and in overruling Respondent's motion for same, thereby specifically rejecting one of respondent's principal contentions i.e. that the special verdict of the jury as a matter of law entitled respondent to judgment.* (R. 14.) See *Assignment of Error No. 11* (R. 621).

Petitioner thereupon sought a review of the cause by means of a motion to the Supreme Court of Ohio to direct the Court of Appeals to certify its record to the Supreme Court of Ohio for review, and also seeking a review on Constitutional questions under the Constitution of the State of Ohio and of the United States pertaining to the right of petitioner to a trial by jury in an action brought under the Federal Employers' Liability Act. (R. 631) (R.

637-638.) The jurisdiction of the Supreme Court of Ohio to review the case is found under Article IV, Section 2, Constitution of the State of Ohio. Under these provisions of the Constitution of the State of Ohio, petitioner had no appeal as a matter of right to the Ohio Supreme Court. Review by that Court is discretionary upon the ground that the case is one "Of public or great general interest," or "that a debatable constitutional question is involved." The review sought by petitioner raising questions of public or great general interest and constitutional questions was denied by the Ohio Supreme Court. (R. 639.) At the same time, respondent likewise sought a review by the Ohio Supreme Court of the judgment of the Court of Appeals for Cuyahoga County by means of a cross-motion to certify, likewise claiming questions of public or great general interest. (R. 633.) The Supreme Court of Ohio, however, refused to take jurisdiction of the cause and issued orders overruling the motion to certify of petitioner, the cross-motion to certify of respondent, and determined that no debatable constitutional question was presented by the judgment of the Court of Appeals. (R. 639 *et seq.*) Respondent thereupon filed a motion for a re-hearing on its cross-motion to certify, which motion was denied. (R. 642.) Thus, all remedies available through the state judicial system of the State of Ohio have been exhausted by petitioner.

Under the Law of Ohio, therefore, the judgment of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, became the final judgment of the highest court of the State of Ohio in which a decision could be had. *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 37 S. Ct. 653 (1917).

JURISDICTION OF THIS COURT.

Jurisdiction of this Court to review the said judgment of the Court of Appeals for Cuyahoga County and to review the constitutional questions raised by petitioner are conferred upon this Court by the Act of June 25, 1948, c. 646, 62 Stat., 929, Title 28, U. S. C. Section 1257. The portions of that section pertinent to jurisdiction of this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or statutes * * * of the United States."

In this case petitioner specially set up and claimed a right under a statute of the United States, namely, the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C., Secs. 51-60, and Amendments thereto. (R. 1-4.) Petitioner asserts that the judgment of the Court of Appeals of Ohio under this Federal statute is not in accord with applicable decisions of this Court.

The orders of the Supreme Court of Ohio which overruled petitioner's motion to Certify the Record and review the judgment of the Court of Appeals were entered less than ninety days from the filing of the Petition for writ of certiorari, which Petition was duly filed in accordance with the Act of Congress of June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, Sec. 106, 63 Stat. 104, 28 U. S. C., Sec. 2101 (c). Certiorari was duly granted by this Court (R. 643).

QUESTIONS PRESENTED FOR REVIEW.

1. In this action under the Federal Employers' Liability Act was the Court of Appeals correct in holding that the proofs of petitioner on the issue of causal connection failed to rise above the level of "speculation and conjecture" when tested by the quantum of proof prescribed by this Court to justify submission of the cause to the jury?

2. By its order of judgment directing a verdict for respondent for the sole reason that the proofs of petitioner on the issue of causal connection failed to rise above the level of "speculation and conjecture," did the Court of Appeals thereupon deny petitioner his constitutional guarantee of trial by jury under the Federal Employers' Liability Act. 45 U. S. C. A., 51?

3. Was the invocation of jurisdictional power by the Court of Appeals to weigh the evidence and thereupon substitute its finding for that of the jury on the issue of legal causation an unlawful exercise by the Court of Appeals of jurisdictional power under the doctrines of appellate review pronounced by this Court in actions brought under the Federal Employers' Liability Act, 45 U. S. C. A., 51?

4. Where an examination of the Record of testimony in its entirety discloses circumstantial evidence from which the jury could infer the necessary legal causation between respondent's negligence and petitioner's injury, may the Court of Appeals determine as a matter of law that such evidence is not "proof," but merely "speculation and conjecture," and thereby enter judgment for the respondent as a matter of law after the jury had found causal connection in the special verdict and judgment upon the verdict of the jury had been entered for petitioner?

5. In this action under the Federal Employers' Liability Act, was the Court of Appeals correct in applying as a legal standard to determine legal causation, proof of an "efficient" cause?

6. In this action under the Federal Employers' Liability Act, where petitioner adduced proof that his injuries were the result of an insect bite from an insect which could have come from the unsanitary pool of water complained of, was petitioner required to adduce proof that the insect did not come from other sources for which respondent was not liable?

7. In this action under the Federal Employers' Liability Act, were the special findings by the jury of negligence and causal connection supported by credible evidence when correctly tested by principles governing judicial review set forth by this Court?

8. In this action under the Federal Employers' Liability Act, where the jury, in response to specific inquiries submitted to it as a special verdict, found particular acts and omissions of the respondent which in the opinion of the jury constituted negligence, and the jury found a proximate causal relationship between the conditions constituting negligence and the injury to the petitioner, may the reviewing Court of Appeals thereupon set aside a judgment in favor of petitioner entered upon said special verdict for alleged insufficiency of evidence where there is credible evidence in the record to support the findings of the jury?

9. Where the Court of Appeals in its Opinion concedes that "*by overwhelming testimony*" the pool of stagnant, vermin-infested water, alongside the tracks of respondent for many years prior to the bite suffered by petitioner contained insects in and about said stagnant pool,

and that insects of the size described by the injured petitioner might infest said pool and bite a man, and that petitioner did in fact suffer a bite on respondent's premises by some insect in the course and scope of employment, and "from such bite severe consequences to Mr. Gallick have ensued," may the Court of Appeals thereupon, under the principles of judicial review pronounced by this Court, find prejudicial error to the rights of respondent in submitting said cause to the consideration of the jury on the sole ground that whether the insect causing the damage had any connection with the pool of stagnant water on respondent's premises, or whether it came from other sources on property not owned or controlled by respondent, presented only a series of "guesses and speculations" making a chain of causation "too tenuous" to support a conclusion of liability on the part of respondent?

STATUTES INVOLVED.

45 U. S. C. Sec. 51, Appendix A
45 U. S. C. Sec. 53, Appendix B
45 U. S. C. Sec. 54, Appendix C
45 U. S. C. Sec. 56, Appendix D
Ohio Revised Code Sec. 2315.15, Appendix E
Ohio Revised Code Sec. 2315.16, Appendix F
Ohio Revised Code Sec. 2315.17, Appendix G

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against respondent railroad, defendant below, in the Court of Common Pleas of Cuyahoga County, Ohio. The petition after the necessary allegations to invoke the applicability of the Federal Employers' Liability Act, alleged negligence in that defendant knew that by permitting a pool of stagnant water on its premises at Lime Road and the Columbus

Road Bridge in Cleveland, Ohio, to accumulate dead pigeons, rats, bugs and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions. (R. 2-3, Spec. of Neg. 6.) Plaintiff further alleged that by reason of such negligence and as a direct and proximate result thereof, he was caused to be bitten by an insect while working in and about said pool of stagnant water in the performance of his employment duties which caused his system to become poisoned and which resulted in the formation of deep, acute ulcerations with draining about his extremities and body, which injuries have necessitated surgery for the amputation of both of his legs, that he is confined to his hospital bed and a wheelchair, and will remain so into the indefinite future. Plaintiff alleged other injuries and permanent incapacity from earning wages, for all of which he prayed as damages the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00). (R. 3-4.)

Defendant, by its answer, admitted that plaintiff's duties for respondent as a yard foreman and yard helper were in furtherance of interstate commerce and that the work duties of petitioner, during the time alleged, specifically the month of August, 1954, caused him to be present from time to time at or near tracks of respondent located in the vicinity of Lime Road and the Columbus Road Bridge. (R. 4-5.) Respondent thereupon pled in its answer to the amended petition certain affirmative defenses which were denied by a reply. (R. 5-6.)

As already indicated, the trial court submitted certain specific issues to the jury as alleged determinative issues under the special verdict statute of the State of Ohio, Ohio Revised Code, Section 2315.15. Upon consideration of the jury's answers to said determinative issues, the trial court thereupon entered judgment in favor of petitioner.

(R. 6-14.) Subsequently, various motions of respondent for judgment on the special verdict, a new trial, or judgment in its favor notwithstanding the verdict of the jury, were overruled by the trial court. (R. 14-15.)

It is important to note that the Court of Appeals in its review of the cause specifically found no error under the laws of the State of Ohio in the admission or exclusion of evidence; the charges of law submitted to the jury; the form of the special verdict or the answers of the jury thereto; the size of the verdict or judgment; or that the special verdict of the jury did not contain findings sufficient to support a judgment for petitioner. See for example the 16 grounds of alleged error prosecuted by Respondent to the Court of Appeals (R. 621, 622) and the statement of the Court of Appeals, "All other claimed errors have been examined, and we find none prejudicial to the rights of the appellant." (R. 628.) *It is crystal clear from the Opinion of the Court of Appeals that if that Court erred in its conclusion that under the law the evidence was insufficient to warrant submission of the cause to the jury in the first place, then in all other respects the judgment in favor of petitioner was proper.* The various procedural claims of error under Ohio Law asserted by respondent were specifically rejected by the Court of Appeals and by the Supreme Court of Ohio in its refusal to take jurisdiction on the cross-motion to certify of respondent and denial of the motion for rehearing of respondent. (R. 636, R. 640-641.) *Thus, the single issue presented is whether the proofs justify with reason the finding by the jury that respondent's negligence played some part in producing petitioner's injuries.* The Court of Appeals held as a matter of law that the proofs did not. This is the fundamental error which forms the basis for the instant appeal on writ of certiorari.

STATEMENT OF FACTS AND EVIDENCE.

In brief, by way of background, it may be stated that in August of 1954, while performing his usual duties as a member of a switching crew, petitioner had occasion to walk in a northerly direction under the Columbus Road Bridge in the "Flats" of Cleveland on the west side of respondent's River Track. (R. 64-65.) This switching job was known as "the downtown job" or "the Seneca street job." (R. 56.) The River Track was a single track running in part under this bridge. (R. 59.) Respondent's right of way included the area on both sides of this track under the bridge. (R. 570 Exhibit 12.) He stopped underneath said bridge for a period of approximately thirty to forty-five seconds to see whether his diesel switch engine was following him up the track. (R. 65) (R. 93.) Upon ascertaining that it was so doing, he took one or two steps again to the north at which time he felt the "bite" of an insect on the back of his left leg just above the knee. (R. 66.) Note special finding of the jury, Exhibit X (R. 14). Upon feeling the bite he squeezed this area of his leg and felt a crack or pop. Something then rolled down his pants leg about two inches long and half inch in diameter. (R. 66.) The Court of Appeals from its review of the testimony entertained no doubt that Petitioner was bitten by an insect on railroad property. The opinion states:

> "We have sufficient credible evidence to conclude, *as did the jury*, that Mr. Gallick suffered a 'bite' on railroad property by some insect while working for that railroad." (Emphasis added.) (R. 626.)

Opposite to where petitioner was standing, on the east side of said track, was a pool of stagnant water which contained quantities of dead pigeons, dead rats, and sundry varieties of crawling and flying bugs, lice and vermin. (R.

59-60.) The stagnant pool underneath the bridge was within respondent's right of way under its possession and control. (R. 282.)

William Molnar, a brakeman of fourteen years service with the respondent, who had worked in this area on and off for several years (R. 17), described the area as a swamp with dead pigeons, rats and insects as long as he could remember.

> "Q. Is it not a fact, Mr. Molnar, that when those rats and pigeons, the dead rats and pigeons, were lying in that ditch, there were bugs and insects around them, is that not a fact, sir?
>
> A. There is always bugs where the stagnant water was.
>
> Q. Were they there when the rats were there and the dead pigeons were there, Mr. Molnar, is that not a fact?
>
> A. Yes." (R. 23.)

Walter Rady, a brakeman employed by the defendant for thirty-nine years during which he worked this area on Saturday and Sunday as a relief man (R. 27) described these conditions substantially the same as Molnar. (R. 28-29.)

William Clason, a yard foreman of fourteen years service (R. 31), who had walked under the Columbus Road Bridge many times during his work (R. 32), corroborated these conditions and further the inadequate maintenance efforts of respondent section crew as follows:

> "Q. Is it not a fact that Paul Delaria, the section foreman, had made several attempts to clear this swamp up but was never successful?
>
> A. Yes, he did work on it to drain it.
>
> Q. Sir, please. Read the question. You can answer that, if I have stated a fact to you you say yes, and if I haven't stated a fact you say no.

A. Yes.

Q. Is this not a fact, that the condition was bad several years ago, and was still bad in August of '54, sir?

A. Yes." (R. 33.)

Petitioner himself had ten years of experience with respondent as a brakeman or yard foreman (R. 54, 93). He described the conditions underneath the bridge as follows:

"Q. Jim, can you describe the condition underneath the bridge, particularly along the east rail as it was in August of 1954?

A. *Well, there was stagnant water, dead rats, pigeons, with insects flying above and in the water.*

Q. *Were those rats and pigeons in the water?*

A. *In the water and along the rail.*

Q. How long, if you know, had that condition which you now describe existed before August of 1954?

A. As long as I remember.

Q. Well, how long do you remember, Jim?

A. Well, the length of time that I worked for the B & O Railroad, 10 years.

Q. Was it ever cleaned up?

A. I have never seen it cleaned up.

Q. Have you ever complained about it to any one?

A. Yes, to Paul Delaria, the track foreman.

Q. To Paul Delaria, and he is what?

A. He is the track foreman.

Q. Had you complained about that before August of 1954?

A. Yes, a long time before.

Q. Had you complained about it once or more than once?

A. More than once." (Emphasis added.) (R. 59-60.)

It is clear from the testimony of respondent's section foreman, Paul Delaria, that the river track underneath the Columbus Road Bridge, and the drainage of accumulated water from the swamp area underneath the bridge on the east side of the track to a manhole south of the bridge and also east of the track, was under his jurisdiction for maintenance (R. 282, 299). This area is depicted by Exhibit 12, the blueprint prepared by Cyril W. Neff, the Civil Engineering expert called by petitioner. (R. 570.) Although the Columbus Road Bridge itself is a public bridge, the all-important fact is *that control of the drainage underneath the bridge was exclusively under the jurisdiction of respondent's maintenance crew headed by Mr. Delaria.*

The measurements of Cyril W. Neff were the only testimony in the entire case purporting to show grade elevations of the area in question. The entire problem with regard to drainage of the swamp area is summarized by Mr. Neff as follows:

> "Q. Mr. Neff, I pointed to the area underneath the bridge, that swamp area we are talking about. Is that lower than the pipe or higher, sir?
>
> A. That area is lower than the pipe.
>
> Q. And is that why it will not flow into the pipe, sir?
>
> A. That is one of the reasons why it won't flow into the pipe.
>
> Q. And could that be eliminated by the filling in of slag that you told us about?
>
> A. Yes, sir." (R. 142.)

Respondent did not produce any comparable expert to dispute Neff's testimony that five men in one day could eliminate the swamp and construct a slag fill to provide proper drainage (R. 127, R. 128). Respondent had engi-

neering experts familiar with the drainage problems under this bridge but did not produce them as witnesses (R. 301).

From the foregoing evidence the jury was certainly justified in finding that on premises under the control of respondent there existed a pool of stagnant water into which were accumulated dead pigeons, dead rats, vermin and bugs. Petitioner was required to perform his work duties in close proximity to said area. (R. 64, 67.)

With regard to the unhealthful or unsanitary nature of the foregoing conditions, there is the testimony of Dr. Ippolito as follows:

> "This man was working near a rat-infested pool, with dead rodents in it, and bugs flying in the air. The man was bitten by an insect, and the conditions that followed thereafter. I don't know how I could assume anything else, that the causative agent was this insect bite." (R. 219.)

Dr. Ippolito, gave as his professional opinion that some bacteria was introduced into this man's body at the time of the bite (R. 219; R. 220), and further testified as follows:

> "I get it from the history of the patient. The patient told me that he was bitten by an organism, by an insect, *and we do know that stagnant pools of water, particularly that are infected and have rodents, rats, in them, that insects will go to that area more so than in a dry, clean area.*" (Emphasis added.) (R. 222.)

Further testimony with regard to the unsanitary and unhealthful nature of this work area is contained in a portion of the cross examination of Dr. Robin Anderson, who testified as follows:

> "From this point we have our own history in terms of the record. We must carry our basic reasoning back one step further, *and that is that the presence of filth,*

of rats, of dead vermin, of stagnant water, predisposes to disease, predisposes to the growth of insects and the like."

"This man was bitten in close proximity to such an area of stagnant filth, and it is only logical *and we must assume that the probability is there that whatever it was in the insect, in the bug, is related to the presence of that area."* (Emphasis added.) (R. 261.)

Further, Dr. Anderson testified as follows:

"I can say in terms of medical specialized knowledge, a medical, *a doctor is expected to understand principles of sanitation, and as such we know that the presence of stagnant water is traditionally a breeder of water insects, and we know that the presence of rats implies the presence—or of various insects that feed on it*, such as plague-carrying insects which is the rat flea which lives on the rat both living and dead, and it is the cause of the famous plague episodes in history. We know a certain number of facts which are specialized perhaps in the medical sense but not specialized for an entomologist or an insect expert." (Emphasis added.) (R. 263.)

The Court of Appeals conceded that the evidence supported Petitioner's claim that the cause of his misfortune was the insect bite.

"We have an *abundance* of testimony that from such 'bite' severe consequences to Mr. Gallick have ensued." (Emphasis added.) (R. 626.)

As already noted, the incident occurred after petitioner had been standing for thirty to forty-five seconds a track width opposite the cesspool which contained the filthy conditions already referred to in the performance of his work duties. He then turned around and took a step or two to the north when he felt this bite and cracked or popped what had the feel of an insect. (R. 66.)

Thus, petitioner testified that he felt pain which was severe in the beginning and that when he climbed on the footboard of the diesel, he showed it to one of his fellow crew members. (R. 67.) When he finished his tour of duty, he had a sensation above the knee on the back of his thigh and washed the area at his locker with soap, a washrag and water (R. 67). When he arrived home at 11:00 o'clock P. M., he was still conscious of the sensation and had his wife look at the welt (R. 68). The area never cleared up and after four or five days, formed a boil (R. 69). The boil burst in the bathtub following which he went to his family doctor, Dr. Heller (R. 69, 70). The Marymount Hospital records introduced into evidence and other testimony prove that from this original site the first ulceration developed (R. 572, R. 583) (R. 385), (note especially R. 581). This was, of course, corroborated by the petitioner himself in a statement to Respondent's claim agent given in the hospital without benefit of counsel. (R. 612, R. 613.)

Mary Gallick, the wife of petitioner, testified that on the night in question, she saw a welt just like when you get a bite, which was pink in color and about the size of her nail. (R. 37.) The following morning, it got deeper in color, a deeper pink (R. 37). By the fifth day it was larger and real pink and began to raise (R. 38). By the time petitioner went to Dr. Ippolito, the area in question was described by Mrs. Gallick as follows:

> "By that time it was about the size of a half a dollar and it had raised and it had been draining on the side, and it looked very ugly." (R. 39.)

Without further encumbering this brief with factual recitations, it is undisputed that when this original lesion failed to heal with conservative treatment, petitioner was hospitalized at Marymount Hospital where-

upon a skin graft was instituted and it was only following the initial skin graft that the skin surfaces on both legs began to break down and form ulcerations which thereupon spread to other parts of his body. During this entire period of time, petitioner was under constant surveillance by trained medical technicians and physicians with daily progress notes recording his confinement at Marymount Hospital and the Cleveland Clinic. *It is significant to note that the final diagnosis of the Marymount Hospital, recorded after almost two years of continuous hospitalization, was "pyodermagangrenosa, secondary to insect bite."* (R. 577.)

Respondent's own medical expert, Dr. Davis, testified as follows:

> "Q. *Doctor, is a bite or sting from a bug a trauma?*
> A. *Yes.*
> Q. What is the meaning of the word trauma?
> A. I believe it means an injury.
> Q. What is the meaning of the term local trauma?
> A. Local trauma means that it happened in a locality of the body rather than to the whole body.
> Q. An isolated area.
> A. Isolated area.
> Q. *Is pyoderma used sometimes instead of pyoderma-gangrenosa?*
> A. *Yes, it can be. They do not mean quite the same but they are used together.*
> Q. *Do you have an opinion as to whether pyoderma can be caused by trauma?*
> A. *Yes, I think it can.*
> Q. *Is it one of the recognized causes of pyodermagangrenosa?*
> A. *Well, yes, I think it is fair to say it would be a recognized cause."* (Emphasis added.) (R. 426.)

It must be emphasized from the foregoing that it was only in the area in and about the Columbus Road Bridge,

particularly where the pool of stagnant water was maintained, that insects of the approximate size and character which bit petitioner were observed (R. 157). *No witness testified to having observed similar insects in any other area, but petitioner did testify as to observing insects that looked like this one felt "on these dead hides."* (R. 157.) We believe that this evidence as herein set forth, under the law, as will be analyzed hereinafter, entitled the jury to make the inference which it did as to a causal connection between the stagnant pool of water, the bugs, the bite which plaintiff sustained and his illness. (Exhibit U, R. 13.) In this connection again it must be emphasized that both of his treating physicians who testified, i.e., Doctors Ippolito and Anderson, surgeons of unquestioned reputation and qualification, testified that the described conditions were the most likely source of the disease process which debilitated petitioner. As physicians it was necessary for them to be familiar with problems of sanitation which would include the problems of disease process bred by dead, putrid animal matter of the type herein described, with insects seen crawling and flying in and about this matter.

ARGUMENT.

SUMMARY.

This appeal seeks to correct fundamental errors in the very nature and method of the judicial review indulged in by the Court of Appeals in an action under the Federal Employers' Liability Act, which fundamental errors the Supreme Court of Ohio refused to review, thereby reducing the judgment of the Court of Appeals to a final judgment.

Respondent had sought review from the Court of Appeals of Cuyahoga County upon the judgment in favor of petitioner entered by the trial court and had alleged for the consideration of the Court of Appeals sixteen grounds of error. (R. 620-622.) Most of these grounds concern themselves with procedural questions, particularly evidentiary questions, instructions of law, the findings of the jury on the special verdict, the amount of damages assessed by the jury, and other issues of trial procedure. All of these alleged grounds of error were carefully considered by the Court of Appeals and as stated in the language of the Court of Appeals, "All other claimed errors have been examined, and we find none prejudicial to the rights of the appellant." (R. 628, R. 630.) The Court of Appeals carefully limited its judgment of reversal to the narrow ground of an insufficiency of evidence from the proofs on the issue of causal connection. In its opinion, the Court of Appeals delineated the issue thusly:

> "As we view the record before us, we have a chain of possibilities that *the negligence* of the defendant *might have shared in subjecting the plaintiff to damage and injury*, but the proof of a legal causal connection between the negligence and the damage falls short of that required for the consideration of a jury." (R. 628) (Emphasis added.)

Respondent was apparently in grave doubt as to the propriety of the judgment in its favor rendered by the Court of Appeals for it prosecuted its own claims of error on a cross-motion to certify to the Supreme Court of Ohio. These claims (R. 636) again raised questions concerning the trial procedure and the amount of damages. Because two reviewing courts in the State of Ohio have refused to consider these claims of respondent it would now appear that the only remaining issue for review is the fundamental substantive question of "causal connection."

THE TEST OF A JURY CASE.

Questions 2, 3, 6, 8.

One of the early fundamental cases in which this Court held that trial by jury is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act was *Bailey v. Central Vermont Railway Co.*, 319 U. S. 350, 63 S. Ct. 1062 (1943). The *Bailey* case certainly did not prohibit Appellate Court supervision or jurisdiction over a jury verdict, but it did make it plain that action by Trial Courts or Appellate Courts in removing the case from the consideration of the jury by way of a directed verdict in "close or doubtful cases" did violence to the constitutional right under the Federal Constitution of an injured railroad employee to trial by jury. Yet in the instant case the Court of Appeals held the trial judge committed prejudicial error to the rights of respondent in not directing the case, thereupon raising the issue squarely as to whether the record was so devoid of evidence in support of the principal contentions of petitioner as to remove it from the "doubtful or close" category referred to in the *Bailey* case.

While perhaps the standard of a "doubtful or close case" as pronounced in the *Bailey* case might be considered

somewhat nebulous in determining the test of a jury case under Section 51 of the Federal Employers' Liability Act, it would certainly seem that after the pronouncement of this Court in *Rogers v. Missouri Pacific Railroad Company*, 352 U. S. 500, 77 S. Ct. 443 (1957), a clear standard of what constitutes a jury case was prescribed. In the *Rogers* case this Court made the now oft-quoted pronouncement:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (352 U. S. 500, 506.)

Of course, in the *Rogers* case one might argue that the question is still open as to what this Court meant when the so-called "rule of reason" was pronounced. However, the *Rogers* case was decided in 1956, ten years after the earlier case of *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946). in which this Court stated:

> "* * * a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." (327 U. S. 653.)

Lavender v. Kurn, supra, was followed by *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949):

> "* * * whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."
>
> *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949), especially page 57.

The jury with reason could conclude that there was no other logical place for the bug to come from except the

pool of stagnant water with the dead rats, pigeons and vermin. This was the only vicinity where such bugs or insects were described by Petitioner as having been seen. It was only a track width from the place where petitioner was standing at the time he was bitten. *But, even if the bug could have come not only from the stagnant pool but from other sources as well, for which the respondent would not be liable, the jury under the foregoing authorities clearly had the right to make the inference that it did in fact come from the pool:*

> "It does not matter that, from the evidence, the jury may also with reason, *on grounds of probability,* attribute the result to other causes, including the employee's contributory negligence."
>
> *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506 (Emphasis added); cf. *U. S. v. Diebold, Inc.*, 369 U. S. 654 (1962), summary judgment will not lie where conflicting inferences may be drawn from the underlying facts.

The jury having made such inference, it was prejudicial error for the reviewing courts to substitute the inference of the jury for another inference favorable to that of respondent.

CAUSATION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

Questions 1, 4, 5; 7.

The Court of Appeals determined the test of causation for the within action to be as follows:

> "The question of causation should not get to the jury, and the judge should direct a verdict for the defendant, unless the court is of the opinion that a jury can reasonably find that the defendant's tort was an *efficient cause* of the damage to the plaintiff *and*

not a mere antecedent fact." (Emphasis added.) (R. 628.)

We will, of course, agree that if the employer negligence is a mere antecedent fact, petitioner has failed to prove a necessary element in his case; namely, that there be proof of some causal relationship, however slight, between the employer negligence and the injury of the workman. It does not necessarily follow, however, that this degree of causal connection rise to the level of being an "efficient" cause in order to be a basis for recovery. The words "efficient cause" are defined in the dictionary as meaning:

> "Efficient Cause" "the immediate agent in the production of an effect" *Webster's Third New International Dictionary* (1961).

It is quite clear, therefore, that although on the one hand the Court of Appeals in its Opinion recognized that common law proximate causation is not required in this action, nevertheless the Court fell into the error of applying this test under another label. There is little to distinguish an "efficient cause" from a "proximate cause." A cause to be proximate must be efficient.

The fallaciousness of the test applied by the Court of Appeals to hold that petitioner fell short of proving a case of legal causation may be demonstrated by analysis of many of the recent cases decided by this Court involving this identical issue. A classic illustration that "some" causation as distinguished from "efficient" causation will suffice to sustain the action may be found from the recently decided case of *Davis v. Virginia Railway Co.*, 361 U. S. 354, 80 S. Ct. 387 (1960).

The majority of this Court disagreed with the resolution of this issue by the State Court and held as follows from page 356 of 361 U. S.:

"We think it should have been left to the jury to decide whether respondent's direction to complete the spotting operation within 30 minutes, plus the experience of the brakemen assigned to perform this 'hot job' *might have* precipitated petitioner's injury. The debatable quality of that issue, the fact that fair-minded men *might reach* different conclusion, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving uncontroverted evidence * * * to withdraw such a question from the jury is to usurp its function." (Emphasis added.)

Another good illustration on the degree of causation necessary to sustain the case is *Gibson v. Thompson*, 355 U. S. 18, 78 S. Ct. 2 (1957), involving injuries to an engineer. In the newly constructed yard in which the engineer worked, no walkway had been provided for the 900 foot walk from the roundhouse to yard C. Instead, it was necessary to walk across yards A and B, detouring around equipment and switching movements and progress in those yards. The gravel in the yards was loose and unpacked. It shifted beneath the engineer as he was walking through the yards and he fell and was injured. A jury found that the Missouri Pacific Railroad Company had failed to provide a reasonably safe place in which to work, and the Texas Court of Civil Appeals agreed, but the Texas Supreme Court reversed and ordered judgment for the railroad. That Court said that even though it was bound by Federal Decisions as to what constitutes negligence, *as to sufficiency of the evidence* it had the right to appraise the evidence in accordance with the concept of negligence as announced in prior cases. See 298 S. W. 2d 97, (1957). By this standard, the Texas Supreme Court found no negligence since the railroad had constructed the yard in accordance with specifications of the "best

qualified construction engineers in America" and since, though other employees had had similiar falls, *no one had ever complained to the railroad about the gravel.* However, again this Court reversed with its oft-repeated general admonition:

> "We hold that the proof justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

Even more dispositive of the current law on the issue of legal causation is *Stinson v. Atlantic Coastline Railroad*, 355 U. S. 62, 78 S. Ct. 136 (1957). The facts as revealed in the State Court decision reported in 96 So. 2d 305 (1957), were that Stinson left his engine, which was on a wrecking job, and went to get something to eat. He was never seen again. His severed body was found across the track three-quarters of a mile from where he had last been seen. The body was nude and his clothes were wadded between the tracks 150 yards away. In Stinson's absence, the fireman had made several movements of the train, in violation of company rules, and had not sounded the bell before doing so, as the company rules required. *The Alabama Supreme Court held that the jury could find negligence from this breach of the company rules, but under the circumstances, in which Stinson's body was found, it held there was no evidence as to what had proximately caused his death, or that it was in the course of his employment.* It thereupon ordered what would be the equivalent of an Ohio directed verdict for the defendant. Again, this Court reversed the Alabama Supreme Court, stating merely that the evidence presented a jury question as to whether Stinson's death resulted in whole or in part from the negligence of the railroad.

Of similar import is *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107, 80 S. Ct. 173 (1959),

reversing 256 F. 2d 156. In the *Sentilles* case, the seaman brought an action for damages under the Jones Act, 46 U. S. C. A. Sec. 688, claiming damages by reason of being pitched into the air and falling back to the deck of the ship thereupon allegedly activating or aggravating a previous latent tubercular condition. Judgment had been rendered for the seaman in the District Court which was reversed by the Circuit Court of Appeals because the medical testimony as to causal connection between the traumatic incident and the tubercular condition was in the opinion of the Court "speculative and based upon conjecture." Once again, this Court rejected the label of "speculation and conjecture" as a ground for taking away a jury verdict, but held instead, page 109 of 361 U. S.:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, *evidenced so shortly after the accident*, was in fact caused by the accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or *by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proof.*" (Emphasis added.)

To the same effect, see *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, 81 S. Ct. 6 (1960), reversing 271 F. 2d 194 (6 C. C. A.). In the *Michalic* case, the claim was that a wrench dropped on the petitioner's foot aggravating an existing Buerger's disease. As noted from the opinion, Michalic contended that the proofs were sufficient to justify the jury in finding with reason that there was play in the jaw of the wrench he was using which prevented a tight grip on the nut, thereby entitling the jury to find that respondent, the shipping company, furnished him with a de-

fective wrench. The trial judge found the evidence to be insufficient to present a jury question whether the wrench was a reasonably suitable appliance, *because on the theory that the grip was worn there was never any mention of the grip in the case. The Circuit Court of Appeals took the same view saying there was no evidence that the open or jaw end of the wrench was in any way deficient. The fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle in the wrench.* The Opinion of the Sixth Circuit Court of Appeals may be found in 271 F. 2d 199. However, this Court stated as follows:

> "We think that both lower Courts erred. True, there was no direct evidence of play in the jaw of the wrench, as in *Jacob v. New York City*, 315 U. S. 752, 754. But direct evidence of a fact is not required. *Circumstantial evidence is not only sufficient but may also be more certain, satisfying and persuasive than direct evidence.*" (Emphasis added.)

There is nothing unusual about the foregoing pronouncement and it can, of course, be said with certainty that both the trial court and the Sixth Circuit Court of Appeals recognized that it is not necessary to have any direct evidence to prove an essential fact in issue. A sufficient degree of circumstantial evidence has always been recognized even in common law as proof of a fact in issue. *The real question is in evaluation of the circumstantial evidence to determine whether in fact the evidence as thus adduced is sufficient to entitle the jury to make the inference of the essential facts or whether it falls below the standard of proof and must be relegated to the role of speculation and conjecture.* It seems that once again the mandate is clear that the decision as to whether the evidence is sufficient to permit an inference of an essential fact, or falls below the standard of proof required,

and is mere speculation and conjecture is not, in an F. E. L. A. case, or a Jones Act case, a decision which the Appellate Court may make but is part of the right of the employee to have the jury weigh the evidence. Once there is some evidence of a fact, the question as to whether that evidence is sufficient to entitle the jury to make an inference of a further fact essential to support the cause of action is, under the Federal Employers' Liability Act, a function strictly for the jury. The jury cannot be deprived of its right to exercise that function by a reviewing court classifying the circumstances as being within the realm of mere speculation and conjecture.

Other cases which might be cited in support of the proposition that an efficient producing cause is not the test to be applied in a Federal Employers' Liability Act case as the standard of legal causation, are *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *McBride v. Toledo-Terminal Railroad Co.*, 354 U. S. 517, 77 S. Ct. 1398 (1957); *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *Schulz v. Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608 (1956); *Harris v. Pennsylvania Ry. Co.*, 361 U. S. 15, 80 S. Ct. 22 (1959).

THE DECISION OF THE COURT OF APPEALS OF OHIO.

Question 9.

A. The Court of Appeals imposed an improper burden upon Petitioner.

This Court has, of course, on frequent occasions held that in the absence of proof of negligence a verdict for petitioner cannot stand. See *Inman v. B & O Railroad Co.*, 361 U. S. 227, 80 S. Ct. 242 (1959); *New York, New Haven and Hartford Railroad Co., v. Hanagan*, 364 U. S. 441, 81 S. Ct. 198 (1960). However, it is equally clear from the authorities already cited that where the proofs justify a

finding of negligence, a verdict for petitioner should not be reversed under the standards of judicial review pronounced by this Court on a theory that the causal connection between such negligence and injury is based upon speculation and conjecture, particularly when there is an evidentiary basis in the record for a finding of causal connection.

It should be noted, however, at the outset, that in both the *Inman* and the *Hanagan* cases this Court found no evidence of *negligence*, and that the injuries were in fact brought about by the intervention of a third party over whom there was no showing that the railroad had any right of direction and control. Neither the *Inman* nor the *Hanagan* cases were concerned with the sufficiency of proof of *causal connection* once the *negligence* of the employing railroad was established to the satisfaction of the Court. *In the instant case, as noted from Opinion of the Court of Appeals, the necessary element of negligence was established from the record to the satisfaction of that Court. Thus, the Court of Appeals stated:*

> "We can, with reason, say that, to maintain for a period of years a stagnant, vermin-infested pool of water on and over which insects gather, on property where employees are required to work, could furnish the gravamen of an offense under the Federal Employers' Liability Act." (R. 626.)

In this connection, it is worthy to note that unlike the *Inman* and *Hanagan* cases no third party is here involved. The negligence was the improper maintenance of its own property by the respondent, and a static condition of many years existence of which, according to the proofs, the respondent had adequate knowledge. It cannot be argued with any degree of fairness that the insect in the instant case, which was merely a transmittal agency, can be

likened to the "drunken driver" in the *Inman* case, or the "suicide" in the *Hanagan* case.

At this point it is well to digress and analyze further the Opinion of the Court of Appeals in which that Court fell into the error of concluding that the evidence in support of the inference that the poisonous insect came from the stagnant pool of water fell short of the required degree of proof *because the petitioner had failed to adduce evidence to exclude the fact that it may have come from the nearby putrid mouth of the Cuyahoga River, or from weeds, or unsanitary places situated on property not owned or controlled by the railroad.* (R. 628). It was for this reason that the Court of Appeals determined that the evidence that it came from the pool of putrid water under the Columbus Road Bridge required guesswork, speculation, or conjecture on the part of the jury. *We feel that any fair reading of the Opinion of the Court of Appeals makes it obvious that what that Court is saying is that there was evidence, as already alluded to in this brief, from which it might have been inferred that the insect became infected from the pool of water and thereupon crawled up petitioner's pants leg and bit him, setting in motion the chain of events which led to his present condition. But there was likewise evidence that the insect may have come from contaminating sources over which the respondent had absolutely no right of control and produced the same result; that to determine from which source this particular insect came would involve pure speculation and conjecture on the part of the jury.* This is but another way of saying that where there are two causes, each of which are capable of producing the harm complained of, but for only one of which the defendant would be liable, it devolves upon the petitioner, having the burden of proof, to eliminate the non-liability cause. Thus the Court of Appeals

imposed upon petitioner the burden of proving common law proximate causation. See *Gedra v. Dallmer Co.*, 153 Oh. St. 258, 91 N. E. 2d 256 (1950), especially syl. 3.

However, as already noted from the many citations herein set forth, particularly *Lavender v. Kurn, supra; Rogers v. Missouri Pacific Railroad Co., supra; Schulz v. Pennsy. Ry. Co., supra; Harris v. Pennsylvania Railroad Co., supra;* and *Michalic v. Cleveland Tankers, Inc., supra; the power of the jury to make the inference that the insect came from the liability source, rather than one of the non-liability sources mentioned, is peculiarly a jury function under the law of causation as applied to Federal Employers' Liability Act cases.* It was the failure to recognize this role of the jury which forms the fundamental basis of the error of the Court of Appeals as is demonstrated by their use and reliance upon the language of "efficient causation" in the Opinion of that Court. The Court of Appeals thus reversed a judgment in favor of petitioner and entered final judgment for respondent on the false premise that petitioner must not only adduce proof of causation but eliminate non-liability causes as well. This common law doctrine which is part of the law of "proximate causation" has repeatedly been repudiated by this Court in Federal Employer Liability Act cases. The principles of legal causation in an action under the Federal Employers' Liability Act, as distinguished from the common law requirement of proximate causation in a common law negligence action, were ably summarized by Evans, Circuit Judge, in *Eglsaer v. Scandrett*, 151 F. 2d 562 (1945), with a quote from *Roberts, Federal Liabilities of Carriers*, Sec. 869.

In this connection, we believe that the principles of law enunciated by this Court in the leading case of *Tennant, Admx. v. Peoria & P. U. Railway Co.*, 321 U. S. 29,

64 S. Ct. 409 (1944), have peculiar application to the issues raised by the instant appeal.

In the *Tennant* case it will be recalled a switchman was killed under circumstances which the Courts below (134 F. 2d 860) held insufficient to establish evidence of causal connection. There were disputing inferences which could reasonably be drawn from the evidence, all as more fully pointed out by this Court on page 33 of its Opinion, 321 U. S. On page 34 of 321 U. S., the Opinion of the Court, the following is contained:

> "In holding that there was no evidence upon which to base the jury's inference as to causation, the Court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the Court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of *direct* proof as characterizes the one adopted by the jury. But to the extent that they involve a disobedience of duty by Tennant no assumption of risk or contributory negligence on Tennant's part be presumed in order to negate an inference that death was due to respondent's negligence." (Emphasis ours.)

321 U. S. 35, of the Opinion of the Court:

> "It is not the function of a Court to search the record for conflicting *circumstantial* evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. *The focal point of judicial review is the reasonableness of the particular inference or con-*

> *clusion drawn by the jury.* It is the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. *The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.* * * * That conclusion, whether it relates to negligence, *causation* or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury *could* have drawn different inferences or conclusions or because Judges feel that other results are more reasonable." (Emphasis ours.)

It is clear from the caveat of the *Tennant* case that the Court of Appeals fell into the very error admonished against by this Court. Specifically, in removing from the jury its function to select from among conflicting inferences and conclusions that which the jury considered most reasonable, even though there were proofs in the record for the jury to select the very inference which it did; namely, that the bite to petitioner which caused his condition of ill-being was directly connected to the unsanitary conditions maintained by respondent in said pool of stagnant water.

B. The Court of Appeals substituted its judgment for that of the jury in weighing the evidence.

The following from the headnotes of *Lavender v. Kurn, supra,* would appear dispositive of this question:

> "3. In suits under the Federal Employers' Liability Act, the Appellate Court's function *is exhausted* when the evidentiary basis for the jury's basis becomes apparent, it being immaterial that the Court might draw a contrary inference or consider another con-

clusion more reasonable. Page 653." (Emphasis ours.)

"4. Only when there is a *complete absence* of probative fact to support the conclusion reached by the jury does reversible error appear. Page 653." (Emphasis ours.)

"6. In actions under the Federal Employers' Liability Act, rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge. Page 653."

The foregoing was further clarified by *Rogers v. Missouri Pacific Railroad Co., supra,* especially the following headnote:

"5. In actions under the Act, Congress has vested the power of decision *exclusively* in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer plays *any part* in the employee's injury. Pages 504-505, 509-510." (Emphasis added.)

It would certainly appear from the foregoing that if there is any evidence at all in the instant Record to support a finding by the jury that employer negligence played some part in producing plaintiff's injuries, then the Trial Court was duty bound to submit the issue to the jury and the Court of Appeals erred prejudicially in holding to the contrary.

This proposition would seem to be abundantly clear from the case of *Gulf, Colorado & Santa Fe Railway Co. v. Deen,* 353 U. S. 925, 77 S. Ct. 678 (1957) and 358 U. S. 57, 79 S. Ct. 1 (1958). The *Deen* case was tried in the State Court of Texas. The facts revealed that plaintiff broke his leg trying to dump babbitt from a defective melting pot. He undertook the task alone without any specific suggestion or requirement by his foreman who did not know that Deen was doing this particular job at that time. A co-em-

ployee named Snow observed plaintiff struggling with the babbitt kettle and voluntarily assisted him. The evidence clearly establ. .ed that the safe way to dump the babbitt was to dump the pot away from the men. However, because of the weight of the pot containing the babbitt the two men were unable to control the pot in this manner and therefore attempted to dump the babbitt by turning the pot toward them. There were other men generally available about the area whom plaintiff could have requested to assist him and with their assistance the pot could easily have been dumped the safe way; that is, away from the men. On prior occasions by getting sufficient help plaintiff had safely performed the task by dumping the pot away from him. On this occasion, when plaintiff and Snow were dumping the pot toward them, the babbitt fell out, striking plaintiff in the leg causing his injuries.

Plaintiff's claim of negligence was insufficient help or in the alternative, insufficient tools. The case was submitted to the jury on a special verdict under Texas Procedure. *The jury rejected plaintiff's contention of insufficient help or insufficient supervision but did find defendant negligent on the sole ground of failure to furnish plaintiff with proper tools to remove the babbitt. There was no evidence that the additional tools suggested by plaintiff or Snow were in use, safe, or approved.*

Error was prosecuted to the Court of Appeals under the so-called "no evidence point of error" under the Texas Civil Procedure. A "no evidence point of error" under Texas Procedure simply means that the Court of Appeals determines whether there is *any* evidence to support a finding of negligence and if it finds *none* from the record, it affirms this ground of error by entering final judgment for the defendant. The Court of Appeals thereupon affirmed the "no evidence point of error" urged by defendant

the report of which may be found in 275 S. W. 2d 529 (1955). The Texas Court of Appeal held that the employer was obliged under the Federal Employers' Liability Act to adopt only one reasonably safe way in which to perform the task. Specifically, it held that since the task could be safely performed by sufficient help and sufficient help was available for this purpose, the employer owed no duty to provide any special tools. (This is the equivalent of what was done by the Court of Appeals in the instant case in holding that the trial court prejudicially erred in not directing a verdict because there was no evidence to support plaintiff's cause of action on causal connection.)

The Texas Supreme Court refused to review the case, that is, dismissed the application for writ of error, whereupon appeal was perfected on a petition for a writ of certiorari to the Supreme Court of the United States which reversed the Texas Court of Appeals, the judgment of reversal being reported in 353 U. S. 925, 77 S. Ct. 678 (1957), and remanded the case to the Court of Appeals for further proceedings. At this point, the defendant urged the Court of Appeals to consider its second point of error, what is known as "the insufficient evidence point of error" under Texas Procedure. Under the insufficient evidence point of error proceeding, if the Court of Appeals finds this point to be well taken, it cannot enter final judgment for the defendant, but must remand the cause for a new trial. The Court of Appeals, however, considered itself foreclosed from considering this point in view of the decision of the United States Supreme Court in holding that the proofs justified the jury finding with reason that employer negligence played some part in producing the petitioner's injury. This time, however, the Supreme Court of Texas disagreed and granted a writ of error for the purpose of remanding the cause for a new trial on the

insufficiency of evidence point of error urged by the defendant railroad. This Opinion may be found in 306 S. W. 2d 171 (1957). However, on appeal again to the United States Supreme Court, this Court held that its earlier decision did indeed foreclose the question of insufficiency of evidence and that the Texas Supreme Court had no authority to remand the case for a new trial. See 358 U. S. 57, 79 S. Ct. 1 (1958).

An explanation of the Texas Procedure on the so-called "no evidence" and "insufficient evidence" points of error may be found in a Law Review article, "No Evidence and Insufficient Evidence Points of Error," 38 *Texas L. R.* 361 (1960), by Robert W. Calvert, Associate Justice of the Supreme Court of Texas. Any fair reading of the *Deen* case in the light of its history establishes that the United States Supreme Court intends the jury to have the sole power of decision in factual questions of negligence and causal connection and the Appellate Courts are not permitted under this Act to weigh the evidence to determine its sufficiency or total lack thereof, if there is any evidence at all to support the jury finding.

Prior to the *Deen* case, this Court decided the case of *Harsh v. Illinois Terminal Railroad Company*, 348 U. S. 940, 75 S. Ct. 361 (1955), which reversed a decision by the Illinois Appellate Court as reported in 351 Ill. App. 272, 114 N. E. 2d 901 (1953). Although the *Harsh* case was based upon the Boiler Inspection Act, 45 USCA Sec. 23, the question of the sufficiency of the evidence to prove the necessary elements of a cause of action under that Act would be the same as under the Federal Employers' Liability Act, Section 51.

The Appellate Court of Illinois found that plaintiff's evidence taken as true had sufficient probative force to require the issues to be submitted to a jury. But the resolu-

tion of those issues by the jury as to violation of the Boiler Inspection Act were held to be contrary to the manifest weight of the evidence, thereby causing that Court in reviewing the sufficiency of the evidence to reverse and remand the cause for a new trial. The Supreme Court of the United States, in reversing the Appellate Court of Illinois, held in effect that the evidentiary basis to support the jury verdict having been established from the record, the Appellate Court did not have the authority under the Act to determine that such findings were against the manifest weight of the evidence. As already noted the *Harsh* case was decided by the United States Supreme Court in 1955 and the *Deen* case was decided in 1957. Clearly the *Harsh* and *Deen* cases when read together establish the basic principle with regard to Appellate review in these classes of cases that where some evidence can be found in the record to support a finding by the jury, it is prejudicial to the rights of the employee for the Appellate Court to remove the case from the consideration of the jury.

Following the decisions of this Court in the *Harsh* and *Deen* cases the question of Appellate review of the evidentiary basis of a jury verdict in a case brought under the Federal Employers' Liability Act again came before the Illinois Courts, this time to the Supreme Court of Illinois in the case of *Bowman v. Illinois Central Railroad Co.*, 11 Ill. 2d 186, 142 N. E. 2d 104 (1957). Commencing on page 114 of 142 N. E. 2d, Justice Bristow sets forth an exhaustive discussion on the issue of Appellate review of jury verdicts, including his analysis of the *Harsh* case. On this phase of the appeal in the *Bowman* case, *Justice Bristow concluded that there being an evidentiary basis for the verdict of the jury, the Appellate Court was obliged to affirm and did not have the authority to consider the weight of the evidence.* A petition for a writ of certiorari

in the *Bowman* case was denied by the United States Supreme Court. See 355 U. S. 837, 78 S. Ct. 58 (1957).

We certainly want to make it clear in this brief that we are not advocating that the Appellate Courts have no role in Federal Employers' Liability Act cases other than to rubber stamp a jury verdict, or a finding of fact by the jury. The United States Supreme Court has recognized, and we recognize, that where there is *no* evidence to support a necessary element in the plaintiff's case, even though brought under the Federal Employers' Liability Act, that it then becomes the duty of the Court to enter final judgment for the railroad. However, we do contend that when there is such evidence, the Appellate Court does not have the authority to make a finding of fact contrary to that of the jury by labeling such evidence "mere speculation and conjecture." Such a label of necessity means that the Court is weighing the evidence.

About the clearest illustration possible on the functions of Appellate review on the question of the sufficiency of the evidence to sustain the claim is the case of *Gibson v. Elgin, Joliet and Eastern Railway Co.*, 246 F. 2d 834 (1957). The facts as contained in the Opinion reveal that plaintiff was employed by the defendant railroad as a timekeeper. He and a co-employee named George Marjanian worked in a building, the interior of which had a bare wooden floor. There were cinders about the exterior of the building. At the time of the accident there was no doormat at the entrance. Plaintiff worked at a desk around which, from time to time, applicants for employment and employees came on business and brought with them dirt, cinders, pebbles and grease, making the floor dirty and slippery. On the evening of December 12, 1951, plaintiff and Marjanian were working overtime to get out a payroll. Marjanian asked plaintiff to put an adding machine,

which Marjanian had borrowed, under plaintiff's desk to avoid it being damaged by truck drivers in the morning. Plaintiff had done this on other occasions. Plaintiff in putting the adding machine under the desk, struck his head against the edge of the desk. Plaintiff testified:

> "It must have been as I was backing out, because I had a terrific bump on my head, and I must have slipped."

Plaintiff further testified (246 F. 2d):

> "I lost my balance somehow and bumped my head on the edge of the drawer as I was getting out from under the desk. As I was getting out, I say I don't know whether I lost my balance or not." (p. 835.)

Marjanian testified that in a conversation with plaintiff, plaintiff (246 F. 2d):

> "started to tell me that he slipped under his desk and hit his head under his desk; he told me he slipped on some cinders or pebbles; I couldn't tell you exactly what he said at that time." (p. 835.)

The Trial Judge granted a judgment notwithstanding the verdict after a favorable jury verdict for plaintiff. In so doing, the Trial Court stated (246 F. 2d):

> "While the evidence, as showed by this testimony, is that the floor of Building 100 was dirty on the evening in question and that frequently there were quantities of cinders, pebbles, grease and tar on the floor, there is no direct competent evidence that there was any such foreign substance under or in front of the desk, where the plaintiff says he received his injury. At best it can only be inferred." (pp. 835, 836.)

The Trial Judge pointed out that plaintiff testified that: "he must have slipped." The Trial Court further stated in support of the judgment notwithstanding the verdict (246 F. 2d):

> "To find that the plaintiff injured his head by slipping because of a foreign substance on the floor, we must infer, first, that there was such a substance at the place where plaintiff was bending under the desk and, second, that he actually slipped because of such condition. Thus, the finding, essential for the support of the verdict, is based upon one inference which rests in turn upon another inference." (p. 836.)

What is the difference between granting a judgment n.o.v. because "there is no direct competent evidence that there was any such foreign substance * * * where plaintiff says he received his injury," and granting a final judgment on appeal because "whether the insect causing the damage had any connection with the pool of stagnant water on defendant's premises, or whether it came from * * * property not owned or controlled by the railroad, presents only a series of guesses and speculations, * * *"?

In *Gibson, supra,* the Circuit Court of Appeals vacated the order of the trial court granting judgment n.o.v., and ordered that judgment be entered on the verdict of the jury. This Court refused certiorari, 355 U. S. 897, 78 S. Ct. 271 (1957).

Thus, in the *Gibson* case we have the Circuit Court of Appeals recognizing some element of speculation and conjecture on the part of the jury in finding a causal connection, but nevertheless reinstating a jury verdict for the plaintiff after the trial court had set aside said verdict on a judgment, n. o. v. We have the Supreme Court of Ohio taking the position in both *McBride v. Toledo Terminal Ry. Co.*, 166 Oh. St. 129, 140 N. E. 2d 319 (1957), reversed by 354 U. S. 517, 77 S. Ct. 1398 (1957); and *Harris v. Pennsy. Ry. Co.*, 168 Oh. St. 582, 156 N. E. 2d 822 (1959), reversed by 361 U. S. 15, 80 S. Ct. 22 (1959); that because a measure of speculation and conjecture would

be necessary on the part of the jury to find a sufficiency of evidence to support the cause of actions asserted that the verdicts should not be permitted to stand whereupon final judgment was entered by the Supreme Court of Ohio for the appealing railroad. For example in *McBride*, *supra*, the Supreme Court of Ohio foisted upon the plaintiff below the burden of excluding inferences favorable to the defendant railroad below with the following language (166 Oh. St.):

> "* * * Plaintiff has not only failed to establish a causal connection between the failure of the defendant to provide adequate lighting, *he has also failed to exclude the more reasonable inference that his injury was due to the slipping of his shoe from the rung of the ladder.*" (pp. 131, 132.) (Emphasis added.)

In *Harris*, *supra*, this same Supreme Court of Ohio found evidence to support the finding of the jury wanting in the following language (168 Oh. St.):

> "The existence of oil on the crosstie *is at best problematical*, and, *if* there was oil present, there was no showing that defendant placed it there, knew about it, or, in the exercise of ordinary care, should have known about it." (p. 587) (Emphasis added.)

In both *McBride* and *Harris*, this Court granted certiorari and reversed the above holdings of the Ohio Supreme Court. Nevertheless the Court of Appeals in the instant case, in effect, refused to follow the reasoning of *Gibson* (which is directly in point on the issue of causal connection), but chose to follow instead the reasoning of the Ohio Supreme Court in *McBride* and *Harris*, which reasoning had already been rejected by this Court.

CONCLUSION.

We feel that we have demonstrated from the controlling authorities that there is a sufficiency of proof on the record for the jury to make the inference which it did that petitioner was bitten by an insect which came from a disease-producing filthy pool of staghant water, improperly maintained by the respondent on its premises under its control, in which for years it permitted dead pigeons and dead rats to accumulate and rot. There was evidence for the jury to conclude that these unsanitary conditions were the producing cause of petitioner's condition of ill-being. By labeling the proof adduced in support of petitioner's claim of a causal connection as "speculation and conjecture," the Court of Appeals did violence to the mandate of this Court that the function of weighing the evidence to determine whether it meets the standard of an inference is purely a function of the jury in this class of case. To remove the cause from the consideration of the jury by reason of a failure of the petitioner to eliminate other sources for which the respondent might not be liable as an efficient-producing cause of the injury was in fact a usurpation of petitioner's rights under the Federal Constitution as an employee in Interstate Commerce to a trial by jury. The determination as to the right to trial by jury has been construed by this Court and required by it to have uniform application throughout the United States. *The Court of Appeals itself having found evidence in the record to support a finding of causal connection between the negligence complained of and the resulting injury had under the law exhausted its function, Lavender v. Kurn, supra.* Its duty then became that of affirming the judgment entered by the trial court *inasmuch as in every other respect the Court of Appeals found no error prejudicial to the appellant railroad.*

RELIEF PRAYED FOR.

By reason of the foregoing, petitioner respectfully prays that this Court reinstate the judgment of the Court of Common Pleas of Cuyahoga County, Ohio, in favor of petitioner entered upon the special verdict of the jury, reduced to judgment in favor of petitioner in the sum of Six Hundred Twenty-Five Thousand Dollars ($625,000.00), with interest accrued according to law; and that a mandate issue by the Supreme Court of the United States to the Court of Appeals for Cuyahoga County accordingly to reinstate the judgment for petitioner.

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APPENDIX A.

Title 45, U. S. C., Section 51.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX B.

Title 45, U. S. C., Section 53.

Contributory negligence; diminution of damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

APPENDIX C.

Title 45, U. S. C., Section 54.

Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where

the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX D.

Title 45, U. S. C., Section 56.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

APPENDIX E.

Ohio Revised Code, Section 2315.15.

If requested by either party before the giving of any special charge and before argument to the jury, the court shall submit in writing each determinative issue to be tried by the jury and direct the jury to render a special verdict in writing.

APPENDIX F.

Ohio Revised Code, Section 2315.16.

When either party requests it, the court shall instruct the jurors, if they render a general or special verdict, specially to find upon particular material allegations contained in the pleadings controverted by an adverse party, and submitted by the court in writing, to the jury, and shall direct the jury to return a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk.

APPENDIX G.

Ohio Revised Code, Section 2315.17.

When a special finding under Section 2315.16 of the Revised Code is inconsistent with the verdict, the former shall control the latter, and the court may give judgment accordingly.

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 76.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO,
EIGHTH JUDICIAL DISTRICT OF OHIO.

BRIEF OF RESPONDENT.

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EIGHTH JUDICIAL DISTRICT OF OHIO.

BRIEF OF RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

Contrary to petitioner's statement (PB 5-7*), there are in reality only three principal questions presented for review in this case, any one of which, if answered in the negative, will require affirmance of the judgment for respondent entered by the Ohio Court of Appeals. They are:

(1) Was there sufficient record evidence of railroad negligence to require submission of petitioner's FELA action to the jury?

---

* For convenience, the following abbreviations will be used throughout this brief:

Petitioner's Brief on the Merits	PB ___
Printed Record	R ___
Plaintiff's Exhibits	PX ___
Defendant's Exhibits	DX ___

(2) Assuming Question 1 is answered affirmatively, was there sufficient record evidence to take to the jury the question whether petitioner's illness resulted in whole or in part from such railroad negligence?

(3) Assuming Questions 1 and 2 are both answered affirmatively, were the findings of the jury in its special verdict legally sufficient to support a judgment for petitioner?

If all of these questions are resolved by this Court in petitioner's favor, then the following procedural question will also be presented:

(4) Should the case be remanded for consideration of the many grounds of error asserted by respondent but not passed upon by the Ohio Supreme Court, including, among others, errors with respect to the admission of evidence, interpretation of Ohio procedural statutes, and the excessiveness of the verdict?

STATEMENT.

1. Introductory. Petitioner's Statement of the Case is wholly inadequate to delineate the factual context giving rise to the above questions. It is necessary, therefore, to supplement and correct petitioner's statement in three important respects: (1) The statement which follows will correct the numerous errors, exaggerations, and misstatements favoring petitioner which are found in his brief; (2) it will provide the court with a "concise statement of the case containing *all* * that is material to the questions presented," as required by Rule 40(1)(e), thus correct-

* Unless otherwise noted, emphasis is added to all quotations appearing in this brief.

ing petitioner's numerous omissions; and (3) it will point out the numerous and crucial factual issues the establishment of which was indispensable to petitioner's case but upon which the record is wholly silent.

The statement will contain only such facts as are established either by the uncontradicted evidence or by resolving all conflicts in petitioner's favor, as this Court is required to do.

2. The Issues Framed by the Pleadings. Although the amended petition filed in the trial court set forth six specifications of railroad negligence (R. 2-3), only two of these were submitted for the consideration of the jury (R. 540), and it is not understood that petitioner challenges the action of the trial court in so limiting the issues for determination. The two specifications submitted alleged that respondent was negligent:

> "4. In that it failed to provide plaintiff with a reasonably safe place to perform his work duties.
>
> "6. In that it knew that by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions." (R. 540.)

Since no evidence was offered tending to prove that petitioner's place of work was unsafe other than by reason of the alleged property conditions, it is clear that the gist of petitioner's cause of action presented but a single claim of negligence: that respondent "knew" that by permitting unsanitary conditions to exist on its premises it would attract insects harmful to man, thereby creating an unreasonable risk of harm to its employees, including petitioner, and that "as a direct and proximate result thereof, he was caused to be bitten by an insect, causing his illness." (Amended Petition, R. 3.)

The following is the record evidence adduced by petitioner in support of this claim.

3. The Petitioner. Petitioner was 58 years old at the time of trial (1959) and had resided in Cleveland, Ohio, or its suburbs for about 27 years. Prior to 1944, petitioner had worked as a laborer in the construction industry, and from then until the onset of his illness in 1954 he was employed by respondent as a trainman in and about its Cleveland yards. Until then, his medical history had been unexceptional, and he was in good health, so far as he knew, until August of 1954, when the events transpired which gave rise to this action. (R. 52-55.)

4. The Flats Area of Cleveland. For substantially 10 years prior to his alleged insect bite, petitioner's job as a freight train crew man took him daily from one end to the other of what is commonly known as the "Flats" area of downtown Cleveland. Because the single and only ground of liability herein asserted is that respondent knowingly permitted conditions to exist at one place on its right of way which attracted insects harmful to man, thereby allegedly causing petitioner's illness, it is essential that the overall nature and characteristics of the Flats area which surrounded its right of way be thoroughly understood.

The City of Cleveland, a highly industrialized metropolitan area with a population of approximately 1,465,000 people,* is located on the south shore of Lake Erie and extends for many miles to the east, west, and south of the mouth of Cuyahoga River, which is a principal artery of its industrial life. The Cuyahoga is a meandering river which makes its way north to the lake through a flat valley of varying width which is contained on the east and west

* 1950 U. S. census.

by comparatively steep bluffs or valley walls. It is the valley floor, containing a large part of Cleveland's heavy industry, that is known as the Flats. In it are located numerous railroad rights of way including respondent's, three or four large steel mills, an oil refinery, meat packing plants, a garbage disposal plant, junk yards, and other commercial and industrial enterprises too numerous to mention. The river itself, which for at least five miles of its length south from the lake can accommodate large lake freighters and ore boats, served in 1954 and for many years prior thereto as the sole means of removal to the lake of large quantities of raw untreated sewage from substantially the entire watershed of the river. (R. 386-7.) Within a few hundred yards of the place where petitioner claims to have sustained his insect bite, additional raw sewage was dumped into the Cuyahoga River from a group of the city's largest office buildings which overlook the valley. Even closer at hand was a garbage dump at which rats and pigeons were accustomed to feed. (R. 383 *et seq.*, 345-346.)

The place at which petitioner was bitten is within 75 yards of the sewage-laden Cuyahoga River. The numerous maps and photographic exhibits introduced by respondent descriptive of the Flats area (DX J, R. 476; K, R. 615; L; M; N, R. 617) will assist the court in obtaining a general overall impression of its characteristics. They cannot, however, convey the same first-hand sense of its overall unwholesomeness which was possessed by the jurors and courts below, all of whom were personally familiar with the area by virtue of personal experience. In short, as the heart of industrial Cleveland, the Flats are neither clean, sanitary, nor beautiful. It was, however, the place where many thousands of people earn their daily bread, and where petitioner claims that respondent's lack of sanita-

tion resulted in an "injury" to him for which respondent is liable.

5. The Nature of Petitioner's Work. Prior to the date of his alleged insect bite, petitioner had worked regularly either as a freight train brakeman or as a conductor (depending upon whether he had the most seniority in the crew on any given date) on a locomotive and crew known collectively on the railroad as the "downtown" or "Seneca Street" job. The work of the downtown job followed a consistent routine. The crew, composed of an engineer, fireman, conductor, and two or three brakemen, was required to report for work at 3:00 p.m. each day at the "Seneca Street yard office," located in the basement of a building owned by respondent and originally used years ago as a passenger station. The old passenger station, so-called, is situated on Columbus Road, which is the main north-south artery on the east bank of the Cuyahoga, and the building is within 100 yards or so of the river itself. It is also less than a quarter of a mile away from Cleveland's Public Square, which is the hub of downtown Cleveland's business and retail traffic.

From the Seneca Street yard office the crew members would proceed to their engine located on the so-called "river track", which is the B&O main track in the city of Cleveland and runs in a generally north-south direction between and roughly parallel to Columbus Road and the Cuyahoga River. From then on until quitting time at 11:00 p. m., the crew's work took them *thoughout the Flats*, from respondent's main classification yard (the "Clark Avenue Yard") on the south, to the Pennsylvania-B&O interchange track on Whisky Island at the shore of Lake Erie on the north. As shown by the aerial photographs in evidence (DX M, R. 476), the overall trackage

traveled by petitioner in the course of his normal working day was approximately five miles in length, and he normally passed over it as least once in each direction. (R. 83-4)

Petitioner's work as a member of the crew consisted of spotting and picking up freight cars on industry sidetracks along this route, transferring them to the Clark Avenue Yard on the south or to the Pennsylvania Railroad interchange on the north, and moving and classifying cars in and about respondent's own facilities at various intermediate points, including a large B&O freight house and adjacent spur tracks which were within two or three hundred yards of the Seneca Street yard office. (R. 56-59, 83-84.) In the course of his work on the downtown job, petitioner customarily walked or rode a train under a highway bridge called the "Columbus Road bridge" (the scene of the alleged injury) approximately twice a day, and he had been doing this every working day for approximately four years, and irregularly for six years before that, prior to the date of the occurrence herein involved. (R. 93-94.)

6. **Petitioner's Movements on the Day of the Alleged Bite.** On a day in early August, 1954 (about the tenth, the exact date being unknown), petitioner reported for work at the Seneca Street yard office at a time variously described by him to be either an hour (R. 58) or a half hour (R. 85-87) prior to going on duty at 3:00 p. m. He was attired in summer working clothes, including khaki trousers which came down to the tops of his high work shoes, and elastic-topped cotton socks which extended up his legs about 12 inches from the ground. (R. 84-85.) Since on this particular occasion his seniority entitled him to act as conductor in charge of the crew, he spent about 15

minutes or so telephoning the Clark Avenue Yard for instructions as to what switching movements were to be accomplished during his shift. The balance of the hour or half hour prior to going on duty was spent "loafing". (R. 87.)

At three o'clock petitioner and the rest of his crew (none of whom was called as a witness, and only one of whom he could name—R. 62) proceeded to their diesel locomotive on the river track to commence work. After leaving his lunch pail on the diesel, petitioner proceeded on foot to supervise some switching which was to be done in the "spur yard" located west of the Seneca Street yard office, south of Columbus Road, and *immediately adjacent to the Cuyahoga River,* which at this particular point in its meandering northward course runs approximately east to west. (R. 62, 87, 617, 478-9.) The spur yard switching adjacent to the river took about 15 to 20 minutes. When this work had been done, the crew was to take the diesel north on the river track to do some further switching at the West Street team track, a facility just north of Columbus Road. To this end, the diesel backed east out of the spur yard to clear a switch joining it to the river track, while petitioner walked out of the spur yard towards the Columbus Road bridge. (R. 63, 87-88.)

7. **The Columbus Road Bridge.** The Columbus Road bridge, towards which petitioner walked, is a public bridge maintained by the public authorities which carries two lanes of automobile and pedestrian traffic on Columbus Road over the B&O right of way. Respondent's property at this point is approximately 25 feet wide and is occupied by the river track, a single set of rails, which pass under the bridge. The bridge has been in existence in substantially its present form since at least 1921. It is about 25 long and its clearance above the track is such that the

larger railroad boxcars pass beneath it with a scant 3-inch clearance. Approaching the bridge, the river track curves towards the right and north, so as to pass beneath it in a roughly north-south direction, while the public street overhead runs approximately east and west. (R. 287, 284.)

8. The Alleged Insect Bite. When petitioner reached a point directly under the Columbus Road bridge, he felt something which he described in his trial testimony as an insect bite. No one witnessed this incident or was able to confirm any part of petitioner's story of how or where it happened, or even that it happened at all. Since his claim is thus supported solely by his own testimony, it is important that it be carefully reviewed.

Though there were some material discrepancies between petitioner's deposition and trial testimony (*e.g.*, R. 90), his story at the trial was that he walked towards the Columbus Road bridge from the spur yard next to the river, crossing as he did so Lime Road, a narrow unpaved public street which runs between the spur yard and the river track. As he approached the bridge underpass, he followed a raised cinder path just *west* of and immediately adjacent to the river track. (R. 65.) When he reached a point directly beneath the bridge, he stopped in the middle of the path, turned completely around, and stood facing south for about 30 to 45 seconds to see where the diesel was. (R. 65.) *There was no evidence that he felt any movement on his person as he stood there.* Then, when he saw that the diesel had cleared the switch and was following him up the track, he turned back towards the north, took one or two steps in that direction, and then felt what he described as a "bite" on the back of his left leg about 4 inches above the knee. Reaching down he grasped an object *inside* his khaki pant leg between the thumb and first three fingers of his left hand. He did not

then or later see what it was, and *the only evidence from which its nature can be deduced is his description of what it felt like when he grasped it.* According to his testimony, it was about one-half inch in diameter (as big around as his little finger) and two inches long (equal in length to the full breadth of the first three fingers of his hand). (R. 92.) He squeezed it and heard it "crack" or "pop." He then let go of it as he continued to walk northward along the track, and he felt it roll down his pant leg to the top of his shoes, from which it presumably fell out onto the ground. (R. 65-66.)

He testified:

"Q. How do you know you were bitten? A. Well, I know I was bit because I slapped my pants leg and crushed it.

Q. What do you think you crushed? A. Well, it was something, some insect.

Q. Did you see it? A. No, I didn't.

Q. Have you ever seen it? A. No, I haven't." (R. 66.)

"Q. It is a fact, isn't it, that you never saw anything under the Columbus Road bridge, before the insect bite, that looked anything like the one that you felt when you snapped at your pant leg, isn't that so? A. I don't know because I don't know what it was that I felt." (R. 157.)

9. Conditions In and Around the Columbus Road Bridge. Petitioner's basic and sole claim of liability in this case is that the insect which supposedly bit him was attracted by and transmitted to his person some unknown form of illness or disease, from the allegedly unhealthful and unsanitary conditions which respondent negligently permitted to exist under the Columbus Road bridge. (Specifications Nos. 4 and 6 of the Amended Petition were

the only ones submitted to the jury; R. 540.) The evidence descriptive of these conditions was as follows:

All of the witnesses were in accord that for many years prior to August, 1954, there had existed a small standing pool of drainage rain water beneath the Columbus Road bridge, which lay roughly parallel to the river track but located *east* of it, or on the side *opposite* that on which plaintiff stood just prior to his bite. The pool was sometimes larger and sometimes smaller, depending on the amount of rainfall, but in the shade of the bridge it never dried up completely even in dry summer weather like that which preceded the alleged insect bite. In general size and appearance, it was undisputed that the pool was more or less the same in August, 1954, as when the various photographs introduced by plaintiff were taken. It was also undisputed that the bodies of some dead pigeons had been seen in this water from time to time prior to August, 1954. (R. 23-33.) As to the number of dead pigeons, the presence of dead rats, and the number of insects, there was, however, a substantial disagreement (*e.g.*, R. 315-316, 340), and it was uncontradicted that passers-by on the overhead street would frequently throw rubbish and garbage onto the track below. (R. 298-90, 314-5.)

Petitioner's evidence on these questions came largely from his own lips. He testified that the stagnant pool was at least the width of the river track (i.e., not less than ten feet) *removed* from the point where he was bitten; that the area in the vicinity of the pool on the east side of the track was always "filthy" and was never cleaned up; that in this area were continuously to be found carcasses of dead pigeons and dead rats; that there were usually as many as 20 to 30 dead pigeons and 10 dead rats in the area, most of which were under the bridge itself (R. 96-97, 154-

5); and that there were also to be found in the same area "many" different kinds of insects, both crawling and winged, none of which, however, (except for flies, mosquitoes, and Canadian Soldiers*) was petitioner able to name, describe, or otherwise identify. At his deposition two years prior to trial petitioner had testified without qualification that he had never seen an insect that looked to be the same size and shape as this one felt, but he repudiated this testimony at the time of trial and said that prior to August, 1954, he *had* seen insects crawling on the bodies of dead pigeons which were of the approximate size of the object he felt, *but he could not otherwise describe or identify them as to species, type, or appearance.* (R. 59-60, 156-9.)

Petitioner's testimony on these subjects was supplemented in fragmentary fashion by the evidence of three other B&O employees who were called for cross-examination in petitioner's case under color of a recently-enacted Ohio procedural statute (Ohio Revised Code § 2317.152). While they confirmed in a general way petitioner's description of the property conditions in and about the Columbus Road bridge (R. 23-33), none of them was willing to paint the same picture as did petitioner himself, and in no respect was the testimony of any of them more favorable to petitioner's case than was his own.

Petitioner produced only one other witness to testify on the factual aspects of the issue of liability. He was Cyril W. Neff, a civil engineer employed as an expert to survey and testify concerning drainage conditions under the Columbus Road bridge in 1959, a few days be-

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* Canadian Soldiers, as every resident of Cleveland knows, are a harmless seasonal species of flying, non-biting insects which occasionally swarm in off of Lake Erie in large numbers in the early spring and then die in a few days.

fore trial. (R. 198 *et seq.*) The apparent purpose of his testimony was to establish that a simple and inexpensive means was available to respondent to eliminate the standing water under the bridge, thus substantially reducing the supposed health hazards to employees of respondent.

Neff stated on direct examination that the pool could be eliminated merely by filling and raising the area occupied by the standing water with approximately six inches of slag. (R. 127-8.) However, on cross-examination of Neff it was established that even in the absence of any such slag fill, the water level of the pool comes to within one-eighth of an inch of the bottom of the ties supporting the track, and that if the grade of the area were raised by six inches of fill, the ties would be immersed in water to the extent of almost three-quarters of their 8-inch height. (R. 137; 143; 144-5; PX 12, R. 122, 131, 571.) Later uncontradicted testimony disclosed that such filling would have caused "pumping" or vertical movement of the ties and track during the passage of trains and thus created a risk of derailment. It was also established through the same witness that the track itself could not be raised above its present level because the vertical clearance between the tracks and the public bridge above for some of the taller boxcars currently in use on the nation's railroads is already barely adequate, and that the various levels of the system of drain sewers leading away from respondent's property were such that no other effective corrective measures were available to respondent. (R. 284-9; 345.) No other solution was suggested.

10. Respondent's Notice of the Alleged Unsanitary Conditions. Apart from such notice as may be implied by the presumed long-term existence of conditions beneath the Columbus Road bridge, the only evidence tending in any way to prove any prior complaint was petitioner's

own unconfirmed testimony that on one or perhaps two occasions of unknown date, he had asked Paul Delaria, respondent's track foreman, if he would not do something about cleaning up the dead rats and pigeons. (R. 60, 159-62.) Despite elaborate grievance procedures, the very purpose of which was the correction of unsafe or unsanitary working conditions (R. 341-3), petitioner knew of no other similar complaints ever having been made by other employees (R. 162), and it was affirmatively established through the union "griever" that none had been made. (R. 341-5.) There was no testimony of complaints made by *anyone* of an insect bite or of the existence of *any* insects at the bridge, either in unusual numbers or of dangerous kinds.

11. Petitioner's Illness. During the first three or four weeks following the alleged insect bite, it grew in size from a small pimple to the size of a half dollar. Petitioner first sought medical advice on August 26, about two weeks after the "bite," when he consulted Dr. Heller, his family doctor. Dr. Heller's treatment proved ineffective, and about three weeks later, he sought the advice of Dr. Ippolito, who admitted him to Marymount Hospital on September 18, 1954. By this time a large skin ulcer had developed on his left leg, but others shortly followed on far removed parts of his body *where there was no claim of any bite*, such as under the left arm and on the right leg. (R. 580.) The course of these and subsequent skin ulcers has required petitioner to remain a hospital patient almost continuously from that day to this, first at Marymount, later at the Cleveland Clinic, and ultimately at Highland View County Hospital in the Cleveland suburbs. During this time the sores on his legs grew so large and deep that eventually surgical amputation of both legs became necessary. At the time of trial, according to the uncontradicted

medical testimony, petitioner's life expectancy has been reduced to a probability of about four or five years. (R. 429-30.)

12. Petitioner's Medical Testimony. The unanimous medical testimony in this case makes clear that medical science is utterly baffled as to the underlying cause of petitioner's unfortunate illness. The medical testimony consisted of the evidence of four different doctors, three of whom, Drs. Heller, Ippolito, and Anderson, were physicians who had had charge of petitioner's case at various times during the course of his illness. The fourth was Dr. Davis, who had examined him several times on respondent's behalf for the purpose of testifying. Except for the hypothetical opinion of causation, there was no material conflict in the testimony of the doctors. Thus, while each of them described petitioner's ulcerated skin condition as "pyoderma gangrenosa," all agreed that this term was nothing more than descriptive of his symptoms. Dr. Anderson, who cared for plaintiff for about two years during his hospitalization at Cleveland Clinic put it as follows:

> "Q. Will you tell us the meaning of the medical term 'pyoderma gangrenosa'? A. Yes, sir, it is a descriptive term and only a descriptive term.
>
> Q. By that you mean what? A. It describes three things. Pyo means 'pus'; derma means 'skin'; and gangrenosa means 'necrosis.'
>
> Q. In other words, it describes the appearance of the skin condition, is that the idea? A. Yes. * * *
>
> Q. But the term 'pyoderma gangrenosa' does not include a description or reference to any cause? A. No, it does not." (R. 249-50.)

All doctors agreed that the term implies nothing whatever as to the underlying *medical* cause of the condition.

The doctors were also in complete agreement on two fundamental propositions which lie at the very heart of this case:

First, there was nothing about the appearance or nature of the petitioner's ulcer which was medically recognizable as traceable to or characteristic of any form of insect bite; and

Second, that after all the numerous diagnostic tests known to science, the underlying medical cause of petitioner's illness remains completely unknown.

Illustrative of the first point is the testimony of Dr. Heller, to whom petitioner first went for advice about two weeks after the bite. Dr. Heller testified that the lesion had the appearance of an ordinary staphylococcic infection —"a typical boil" (R. 109, 111); that there was nothing about its appearance to suggest that it had been caused by an insect bite, nor did petitioner give him such a history. (R. 107-8, 116.) On the contrary, Heller testified that lesions such as he saw are common happenings; they are caused by staphylococcic bacteria which are found literally everywhere: on a clean person's skin, under fingernails, in the air, and on everything we touch; that such bacteria can enter the body through any microscopic break in the skin, even through a hair follicle; and that the only unusual thing about the petitioner was that in his case, the condition did not respond to sulpha drugs and penicillin, which are usually found to be effective cures. (R. 110-6.)

The testimony of Dr. Ippolito, who treated petitioner during his first hospitalization at Marymount, was to the same effect:

> "Q. In other words, except for what he told you, that place on the back of his leg looked like any other open sore that you might see on another patient? A. Not any open sore. It was tremendous.

Q. Well, except as to size? A. Yes.

Q. But as far as the other appearance was concerned, it looked like an open sore from any cause? A. Yes, sir.

Q. And I might get an open sore if I fall down and skin my knee and knock some of the skin away, and don't take very good care of it and it starts to get a little pussy, would that be an open sore? A. Yes, sir." (R. 225.)

Dr. Anderson testified to the same effect. (R. 252.) Both doctors stated that any hospital record entry or opinion that the first ulcer was "secondary to insect bite" was based entirely upon petitioner's statement to that effect, and not upon any medical determination. (R. 199, 212-3, 219, 225, 252.)

On the second point, both the hospital records and the doctors' testimony reflect in dozens of places that all attempts were unsuccessful to reach any sort of firm diagnosis as to the basic cause of petitioner's illness. Thus, while pyoderma gangrenosa is frequently symptomatic of certain recognized underlying systemic disease (i.e., non-infectious and originating within the patient's own body—R. 253-4), such as ulcerative colitis, empyema, and diabetes, among others (R. 204, 205, 207-10, 216, 227, 229, 251, 252-4, 255-6), none of these was ever found to be present in his case. Cancer was also at one time suspected. (R. 211.) Various types of common surface organisms—viral and bacterial—were cultured from the ulcers at different times, but no one of them remained constant or was ever considered to be the cause. (R. 217-8, 272-3.) Nor was it ever determined why similar ulcers also appeared at other parts of petitioner's body where there was no history of insect bite, for no infection was found in his blood stream. (R. 212-3, 258-9.) Equally mysterious was why the ulcers—as distinguished from the common surface and

air contaminants they contained—proved to be resistant to all the antibiotics usually found to be effective in curing infections. (R. 110, 112, 253.) Dr. Ippolito's conclusion, as expressed in the Marymount Hospital Record (PX 12), was:

> "The patient * * * has had a lengthy hospitalization here as a result of multiple ulcerations of the skin due to pyoderma gangrenosa, *specific etiology unknown.*" (R. 182.)

He defined the word "etiology" as follows:

> "Etiology means the specific cause of a condition." (R. 216.)

The Cleveland Clinic Hospital Records (PX 15, 16, 17) abound with similar notations. The following entries are illustrative:

Jan. 8, 1957.	"No etiology found so far." (R. 257.)
March 1, 1957.	"Etiology never identified." (R. 257.)
April 13, 1957.	"Unknown etiology." (R. 257.)
April 25, 1957.	"Ulcers of legs—unknown origin." (R. 258.)
April 30, 1957.	"Main trouble not yet diagnosed as to etiology." (R. 258.)
June 27, 1957.	"Ulcers of right leg of unknown origin present for two and a half years." (R. 258.)

Dr. Robin Anderson, head of the Cleveland Clinic Department of Plastic Surgery, was questioned at length on this subject and testified as follows:

> "Q. Doctor, at the time of Mr. Gallick's final release from the hospital [Cleveland Clinic], which I think you told us was perhaps last July [1958], at the time he was taken from your hospital out to Highland View, was there a diagnosis entered?

A. This same diagnosis.

Q. What was that?

A. *Chronic ulceration.*

Q. Chronic ulceration.

A. Yes.

Q. *Once again, just a descriptive term?*

A. *Yes.*"

* * * * *

"Q. It does not relate to the cause, the basic cause?

A. It doesn't relate to the bacterial cause or the viral cause, no.

Q. Or some other cause if another cause exists?

A. Of the immediate cause. In terms of organism, no.

Q. *Now, all the time that he was there at the Cleveland Clinic, Doctor, did you ever determine the basic cause of Mr. Gallick's condition?*

A. You mean in terms of this organism that we are talking about?

Q. Well, do you know that we are talking about an organism, or is that theoretical?

A. *For the moment it is theoretical. I don't know what the immediate cause was.*

Q. All right. In other words, after two years at the Cleveland Clinic the folks out there still did not determine the immediate cause of his condition?

A. *We found no bacteriologic or viral, allergic, malignant, neoplasma origin for his ulcers.*" (R. 250-1.)

"Q. Now, you mentioned bacteria and virus. There are other things, too are there not, such as allergy, sensitivities, systemic disease, or conditions?

A. Yes, sir. We reviewed every one of those.

Q. You just didn't find the answer any place here, did you?

A. Not in terms of what you mentioned, no, sir.

Q. So you still don't know why his ulcers didn't heal up and you don't know why new ones developed, do you?

A. This is correct.

Q. And that is after two years of study out there at your hospital?

A. Yes, sir." (R. 252.)

"Q. And having made a *differential diagnosis*, you still have not been able to determine the * * * immediate, the producing cause of these ulcers?

A. The immediate producing cause, yes.

Q. And their failure to heal?

A. Yes." (R. 253.)

"Q. So you still after all these studies are not able to tell us the immediate cause of his condition?

A. Very true.

* * * * *

Q. *Until you find the specific and immediate cause you can't really rule out anything, can you?*

A. Not a single thing." (R. 256.)

13. The Hypothetical Question Asked of Petitioner's Doctors. A single identical hypothetical question was addressed to each of Doctors Ippolito and Anderson by petitioner's counsel, and to no other of his witnesses. (R. 189-94; 243-7.) In it they were asked to assume the truth of a lengthy series of hypotheses concerning the existence of the pool, the presence therein of dead pigeons, dead rats, and *wholly undescribed* insects, the occurrence of an insect bite in close proximity thereto, and the subsequent onset and course of petitioner's illness.

The question did *not* contain any assumption as to: the identity or communicability of petitioner's illness; the species or habits of the biting insect; whether such insect was present at or attracted by the pool or its contents prior to the bite; or where petitioner was when the insect first got upon his person. No such assumptions could be contained because no such facts were in evidence.

At the close of the question each doctor was asked whether he had an opinion based on reasonable medical

certainty as to whether there was "a direct or proximate causal relationship" between: (1) the ditch containing the stagnant water, dead rats, dead pigeons and insects flying around it; *and* (2) the bite or sting sustained by petitioner; *and* (3) his present physical condition. (R. 193-4, 247.) Over timely objection, both doctors responded that in their opinion there was a direct causal relationship between the property conditions under the bridge, *and* the bite; *and* petitioner's subsequent disease. (R. 194, 247.) Thus both doctors opined not only a causal relationship between the bite and petitioner's physical condition but also a pre-existing causal connection between the property conditions *and the bite itself*. In Section D of the Argument section hereof the legal insufficiency of this kind of hypothetical testimony will be pointed out.

14. Petitioner's Doctors Admitted Lack of Specialized Knowledge of Insect Life. Both Drs. Ippolito and Anderson admittedly reasoned, in answering the hypothetical question as they did, that the *biting* insect was attracted by the pool and its contents, and that therefore in their opinion there was a causal connection between the pool and the bite. (R. 222, 261.) Both doctors repeatedly testified that they had no specialized or expert knowledge of insects or their habits. (R. 197, 261, 263, 271, 272.) They also testified that they had *no* knowledge of *any* kind of insect which is one-half inch in diameter and two inches long (the size assumed in the hypothetical question), and that they had *no* knowledge of what the habits of such an insect would be. (R. 197, 222, 224, 270-1.)

15. The Testimony of the Only Expert Entomologist. The complete omissions in petitioner's case with respect to the types and habits of insects which might be attracted to respondent's property were not filled until respondent's case, when the only expert entomologist was called to

testify. Dr. Louis A. Stearns, a medical entomologist whose qualifications were not questioned and whose testimony on these points was entirely *uncontradicted* by petitioner, gave evidence as follows:

The only insects which are reasonably likely to attack human beings, and which would be attracted by the conditions under the bridge, are two varieties of mosquitoes, neither of which remotely approaches the size described by petitioner. (R. 362.) While there are insects as large as two inches long and one-half inch in diameter which are native to northern Ohio, none of them is likely to attack human beings. (R. 363.) The horsefly is the largest insect native to Ohio which is likely to attack human beings, but its maximum size is only about half that described by plaintiff; it would not be attracted to, or breed or feed in, an area like that beneath the bridge, and would not even be likely to alight in such an area if casually present. (R. 363-4.) Further, Dr. Stearns testified that it was highly unlikely that *any* insect could crawl up a man's leg inside his pants and bite him above the knee without having been on his body for at least five minutes. (R. 364-5.)

Dr. Stearns further testified that the *only* insects attracted by the dead animals beneath the bridge are scavenger insects—burying beetles or carrion beetles—but "*they don't sting and they don't bite anyone.*" (R. 380-1.)

Petitioner called witness James R. Skelly, a museum curator, in an effort to rebut some of Dr. Stearns' testimony covering giant water bugs, but he expressly disclaimed *any* qualifications as an entomologist, and he stated that such a bug would bite "only when * * * improperly handled" by a collector, and that he did not know their dietary habits. (R. 495, 502, 503.) Dr. Stearns had testified that giant water bugs do not ordinarily bite;

that one might bite only if taken in hand and squeezed; and that they are not attracted by human beings nor by the conditions on respondent's premises. (R. 368, 369, 381-2.)

Thus, the only record testimony from a qualified insect expert provided *uncontroverted* evidence (1) that there was no unreasonable risk of harm from insect bite presented by the condition of respondent's property; (2) that a causal connection between such property conditions and the presence of the biting insect was nonexistent; and (3) that no insect of the size described by plaintiff would have had prior contact with the stagnant pool or its contents.

16. The Special Verdict Rendered by the Jury. The testimony above summarized is all of the record evidence having any material bearing upon the issues of liability in this case. At the conclusion of all the evidence the Court submitted to the jury a form of special verdict of the Court's own composition. The text of the individual questions of the special verdict together with the answers thereto are set forth in full at R. 559-562. For present purposes it suffices to state that in its answers to the questions of the special verdict the jury purported to find the following: (1) That a pool of water existed under the Columbus Road Bridge on respondent's premises, and that dead pigeons, dead rats, vermin, and bugs accumulated under the bridge in the stagnant water (Questions 1-8); (2) that petitioner was bitten near or about the bridge in August, 1954, while in the performance of his duties (Questions 9-12); (3) that respondent knew that the pool under the bridge would attract dead animals and insects (Question 14); (4) that petitioner's illness or disease was caused in whole or in part by an insect bite (Question

18); (5) that respondent was negligent (Question 16) in that:

> "There existed a pool of stagnant water on premises in possession of and under control of defendant, into which was accumulated dead pigeons, rats, and various forms of bugs and vermin." (Question 17.)

In other answers, however, the jury made the following findings:

> "13. Did the defendant B & O provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time? Answer: *Jury can't decide on this question.*
>
> * * * * *
>
> "20. If the answers to any of the questions numbered 1, 5, 6, 7 and 8 [inquiring whether the alleged unsanitary conditions existed on the Railroad's premises] is yes, was there *any* reason for the defendant B & O to *anticipate* that such would or might probably result in a mishap or an injury? Answer: *No.*
>
> "21. Is there a proximate causal relationship to [sic] the stagnant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff? Answer: Yes.
>
> "22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or *foreseeability* of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? Answer: *No.*"

Notwithstanding the above-quoted answers, and in spite of the fact that the jury rendered no general verdict for petitioner, the Court denied respondent's motion for entry of judgment and entered judgment for petitioner in the amount of $625,000, the damages which the jury found petitioner to have sustained.

ARGUMENT.

SUMMARY.

It is the purpose of this brief to demonstrate that the final judgment entered for respondent by the Ohio Court of Appeals is correct and should not be disturbed by this Court. In so contending, however, respondent will not restrict itself to the single ground of decision set forth in the Court of Appeals' opinion, which in reality represents but one of the determinative issues of the case.

In its framing of the Questions Presented, *supra*, respondent has suggested *three* principal issues on which the decision of this Court is required. The first two Questions relate to the insufficiency of the evidence of railroad negligence, and of causation, respectively, to take the case to the jury. The Ohio Court of Appeals decided only the latter issue, and merely assumed *without deciding* that there "could" be sufficient evidence to establish a jury issue of negligence. (R. 626.) It is the position of respondent, however, that the proofs appearing in this record are insufficient to justify with reason either the conclusion that respondent was negligent or the conclusion that such negligence played any part in petitioner's illness.

In addition to and independent of the foregoing contentions, respondent submits in answer to its Question 3 that the special verdict of the jury, in which it was specifically found *as a fact* that there was "no reason for the defendant B & O to anticipate that [respondent's property conditions] * * * would or might probably result in a mishap or an injury," requires entry of final judgment for respondent: (R. 561—Question No. 20.)

Finally, and in the event that this Court fails to agree with respondent's contentions on any of the foregoing questions, respondent would then be entitled to have the

case remanded to the Supreme Court of Ohio for further consideration of procedural, evidentiary, and damage questions not heretofore examined by it.

The precise reasons why this judgment should be affirmed are as follows:

1. Respondent is free to urge affirmance, and this Court is free to affirm, upon any ground which supports the judgment below. (Section A of Argument, *infra*.)

2. There was no showing that employer property was known to contain insects of a species *likely* to injure or transmit disease to humans in northern Ohio. Likewise, there was no proof that employer premises contained any communicable disease known to northern Ohio. Therefore, there was no proof of foreseeability of harm, and consequently no proof of employer negligence. And this is true even if it be assumed, *arguendo*, that the biting insect did come from employer premises. (Section B of Argument, *infra*.)

3. It is admittedly *not known* that petitioner suffers from a communicable or infectious disease at all. It therefore cannot be concluded with reason that his illness came from anyone's premises, or that it was transmitted by an insect. Moreover, there was no credible showing that the biting insect, whose species is admittedly unknown, came from employer premises. Therefore, there was no proof of *any* kind of causal connection between respondent's premises and petitioner's illness. (Section C of Argument, *infra*.)

4. If the conclusions of petitioner's doctors in their answers to the hypothetical question were logically sound or scientifically valid, *competent* testimony of *qualified* experts could and should have been introduced to furnish the factual support which was legally indispensable

to such conclusions. In the absence thereof, there is no record evidence whatsoever of negligence, foreseeability, or causation. (Section D of Argument, *infra.*)

5. The jurors' verdict, with their direct finding of no foreseeability of "any mishap or injury," and with their refusal to find that the employer premises were unsafe, is not legally sufficient to support a judgment for petitioner and supports the final judgment for respondent. (Section E of Argument, *infra.*)

A. THE ISSUES PRESENTED ARE NOT LIMITED TO THOSE CONSIDERED BY THE COURT BELOW.

Although petitioner's brief purports to frame nine questions (PB 5-7) for review, analysis discloses that each is nothing more than an argumentative variation of a single issue: whether there was sufficient evidence that respondent's assumed negligence was a cause of petitioner's illness to take the case to the jury, which was the only question discussed in detail by the Ohio Court of Appeals. Indeed, at page 9 of the brief, petitioner affirmatively asserts that causation is "the *single* issue presented," and the balance of the brief deals with that question alone.

Petitioner thus seeks to restrict this Court, in its consideration of the correctness of the result below, to an examination of the single ground of decision adopted by the Court of Appeals and apparently would have this court overturn that result and enter final judgment for petitioner if such ground of decision, or the reasoning process of the court, or even the bare choice of words used by the court, are in any respect incorrect.

It is clear that petitioner's effort to so restrict this Court must fail. It has been the undeviating rule of this Court that respondent is free to urge affirmance, and this Court is free to affirm, upon any ground which supports

the judgment below, even though such ground may not have been considered by the lower court. *Langnes v. Green*, 282 U. S. 531, 537-9, 51 S. Ct. 243; *Helvering v. Gowran*, 302 U. S. 238, 245, 58 S. Ct. 154; *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U. S. 276, 283-4, 81 S. Ct. 1316. Thus, the issue of causation is only one of several grounds which independently support the judgment below, all of which will be argued in this brief.

B. THERE IS NO PROOF OF RAILROAD NEGLIGENCE BECAUSE THERE WAS NO PROOF THAT ITS PROPERTY CONTAINED OR WOULD ATTRACT INSECTS (OR MICRO-ORGANISMS) OF A SPECIES LIKELY TO CAUSE INJURY OR DISEASE IN NORTHERN OHIO.

1. Lack of Proof of Any Such Insects (or Micro-organisms) on Employer Premises.

Petitioner's basic theory of negligence is that the respondent "knew" that the alleged unsanitary conditions on its premises would attract insects dangerous to humans, and that petitioner was bitten and diseased by one of the insects so attracted. (R. 3—the Amended Petition.)

In petitioner's brief in the Court of Appeals, the following succinct admission was made by his counsel:

> "* * * there is not one shred of evidence by either plaintiff or defendant which would possibly enable the jury" to identify the alleged biting insect. (Page 74 of that brief).

No witness identified any species of insect other than "ants, sand fleas*, Canadian Soldiers, mosquitoes and flies," as having been observed at or near said pool at any time. (R. 156-7, 316-8.)

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*"Sand fleas" were described as small, fuzzy insects blown in off Lake Erie in June. (R. 317-8.) The same is true of Canadian Soldiers.

There was no showing that *any* insects previously seen on respondent's premises, or likely to be attracted by the conditions thereon, were of a species that is known to cause injury or disease in northern Ohio. (R. 156-7, 263, 316.)

The mere presence of other *unidentified* insects does not imply danger, for it is common experience that most of the many species of insects do not attack man.

No witness, including the petitioner and his co-employees who had worked for years in this area, testified to ever having suffered an injurious bite in the area of this pool, or to knowing of anyone who had. (R. 24-5, 318.)

If petitioner should attempt to broaden his argument by claiming that it was the unsanitary conditions *per se* that allegedly made the premises unsafe and imposed liability in this case, suffice to say also that there was *not a word of evidence*: (1) that respondent's premises in fact contained *any* known communicable disease; (2) that dead pigeons, dead rats, at stagnant water contain *any* known communicable diseases common to northern Ohio; or (3) that the long-existing conditions on respondent's property had at any time caused harm of *any* kind to anyone. (R. 24-5, 219, 263-4, 318.)

From the foregoing it is clear that there was no evidence presented from which it can be inferred with reason that respondent, in the exercise of reasonable care, should have foreseen a likelihood of injury to its employees from the condition of its premises. Therefore, there is no legally sufficient proof of negligence in this record.

In the case of *Inman v. Baltimore & Ohio Railroad Co.*, 361 U. S. 138, 80 S. Ct. 242 (1959), the railroad was charged with negligence in maintaining a public street crossing which was in such condition that it exposed its crossing watchman to negligent, and therefore dangerous, motorists using the crossing. In affirming a denial

of recovery as a matter of law this Court held that direct testimony that on prior occasions motorists had been seen "jumping the gun," thereby inferentially endangering the watchman, was "too slender a reed" to provide evidence that injury from the crossing was "reasonably foreseeable" and the railroad negligent. In substance this Court held that without evidence that the crossing was *known* to be used by motorists of a kind *likely to cause injury*, the proof was not sufficient to present a jury issue of negligence.

The same basic rule of law has even been applied in cases involving injury to a railroad employee by a dangerous co-employee and occurring on railroad property. *Atlantic Coast Line R. Co. v. Southwell*, 275 U. S. 64, 48 S. Ct. 25 (1927); *St. Louis-San Francisco R. Co. v. Mills*, 271 U. S. 344, 46 S. Ct. 520 (1926). Recent cases in accord on similar facts are: *Moreno v. New York Central R. Co.*, unreported below, cert. den. 366 U. S. 928 (1961); *Young v. New York Central R. Co.*, 88 Ohio App. 352, 88 N. E. 2d 220, cert. den. 339 U. S. 986 (1949).

In the cases cited the railroad certainly was responsible for the vicious employee being on its premises, and it certainly knew of his presence. But without *further* evidence that such employee was *known* to be of a kind *likely to cause injury*, there was no proof of reasonable foreseeability of injury and no negligence as a matter of law.

So, in the case at bar, although the respondent knew that there were "bugs and insects" (and perhaps unidentified micro-organisms) on its premises, there is no negligence merely by their presence, in the absence of a *further* showing that some of them were known to be of a species *likely to cause injury*. There was no such proof offered here, and therefore there is no proof of negligence. And this would be true even if it be assumed *arguendo*

that the biting insect did in fact come from the employer premises, just as the vicious co-employees did in the cases cited.

2. The Legal Requirement of Foreseeability of Harm.

In the historical development of the law of negligence, it has been held from the very beginning that in order to hold a defendant liable for negligence, there must be proof that the conduct claimed to be negligent involves a known, and therefore a foreseeable, risk of harm to others. 8 *Holdsworth, A History of English Law*, 450 (2d Ed. 1937). The indispensability of a foreseeable risk of harm has been underscored time and time again in landmark American cases whose names are household words to every lawyer. *Parrot v. Wells, Fargo & Co.* (*"The Nitro-glycerine Case"*), 15 Wall. 524, 536-7; *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (Cardozo, J.); *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 389, 111 N. E. 1050, 1053. Even the most liberal of present-day commentators on the law of torts are in accord:

> "Knowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the actor either does foresee an unreasonable risk of injury, or could foresee it if he conducted himself as a reasonably prudent man." *Harper and James, The Law of Torts*, § 16.5, p. 907 (1956).

Foreseeability is no less a requirement under the recent decisions of this Court. It applies to actions against the United States under the Federal Tort Claims Act, *Dalehite v. U. S.*, 346 U. S. 15, 42, 73 S. Ct. 956. It has been reiterated in varying contexts as the proper test of liability under the Federal Employers Liability Act. In *Ringhiser v. Chesapeake & Ohio R. Co.*, 354 U. S. 901,

903, 905, 77 S. Ct. 1093, both the majority and dissenting members of this Court agreed that the burden rests upon a plaintiff to show that injury to an employee is "a reasonably foreseeable consequence of any act or omission of the railroad" before a jury case exists. To the same effect are *Lillie v. Thompson*, 332 U. S. 459, 461-2, 68 S. Ct. 140; *Brady v. Southern R. Co.*, 320 U. S. 476, 483, 64 S. Ct. 232; *Inman v. Baltimore and Ohio R. Co., supra*, (361 U. S. 138, 140, 145-6); *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 503. Lack of foreseeability has even been held to shield a vessel owner from the absolute liability of the doctrine of unseaworthiness. *Morales v. City of Galveston*, 370 U. S. 165, 171, 82 S. Ct. 1226. Petitioner has never cited, and cannot now cite, any authority which dispenses with foreseeability as a predicate to liability for negligence. No such authority exists.

The legal insufficiency of the evidence here to take to the jury the question of respondent's negligence is further emphasized by the jury's own conclusion (discussed at Section E hereof, *infra*) that respondent had no reason to anticipate that its property conditions "would or might probably result in a mishap or an injury." (R. 561.)

C. THERE IS NO PROOF OF ANY CAUSAL CONNECTION BETWEEN RESPONDENT'S PREMISES AND PETITIONER'S ILLNESS.

1. No Proof of Species of Insect Involved, and Therefore No Proof of Its Source.

There is no credible evidence in the record from which it may be inferred with reason that the biting insect came from, or was attracted by, the condition of respondent's premises. The biting insect was never observed either before or after the bite. The Court of Appeals, after reading the entire record, referred to the "biting" insect

as being wholly "undescribed (except as to size and biting qualities)." (R. 627.) Moreover, no attempt was made to identify the species of insects of similar size reportedly seen by plaintiff on the "dead hides" at times prior to the day in question. There was no showing that any such insects were of a species either *likely* to bite man, *or even physically equipped to bite.*

The only qualified specialist called to testify (Dr. Stearns—the medical entomologist) testified *uncontradictedly* that "the only kind of insects attracted by dead bodies * * * *don't sting and they don't bite anyone*" (R. 380-1), and that of all insects known to attack humans only mosquitoes would be attracted by the standing water or other conditions present. (R. 362-3, 373.) No claim is made, of course, that petitioner was bitten by a mosquito.

Although petitioner's medical witnesses admittedly reasoned, in order to answer the hypothetical question, that the object felt by petitioner within his pants leg more probably came from the pool than from other sources, yet they not only *admitted* that they had no specialized knowledge whatever of insects or their habits, but also that they possessed absolutely *no* knowledge of the likely species, habits, or origins of an insect *of the size described by petitioner as the biting insect.* (R. 197, 222-4, 261, 263, 270-1). These admissions of ignorance and lack of qualifications destroyed any evidentiary value of their testimony in establishing a causal connection between the pool and the insect which supposedly bit petitioner. (See the cases cited in Section D-1 hereof.)

2. No Proof of the Medical Cause of Petitioner's Illness, and Therefore No Proof That His Illness Is Transmittable by an Insect.

There is no evidence in this record that petitioner is known to suffer from a communicable or infectious disease at all. No "infectious cause of his various ulcers" has ever been found. (R. 266.)

Petitioner's attending doctors admittedly do not know "the immediate producing cause" or "the specific cause" of his illness. They do not even know whether the cause of his condition is "bacteriologic, viral, allergic, malignant or neoplasm" in origin. (R. 251-3; 182, 216, 219.)

After full *differential* diagnosis it has not been determined whether the cause of his ulcers is an infectious or a non-infectious (systemic) disease. (R. 252-3, 266.) And as Dr. Anderson testified: *Until the specific and immediate cause of the ulcers is found a doctor cannot rule out "a single thing" as being the cause.* (R. 256.) Petitioner presented no other doctors on the subject.

The matter of the cause of the ulcers is a medical subject, not a lay subject. The jury therefore could not go beyond the doctors' admitted ignorance on the subject.

It is admittedly not known that petitioner suffers from a kind of disease that is, or even can be, transmitted by an insect. (R. 263.) Yet at page 29 of his brief it appears that petitioner's basic claim is that the insect was "a transmittal agency" of his disease.

There is therefore no proof that the illness involved came from respondent's premises, or from any premises for that matter. In short *there is no showing that petitioner suffers from a disease that is transmittable by any agency, let alone an insect.*

D. THE LEGAL INSUFFICIENCY OF THE DOCTORS' TESTIMONY TO PROVIDE ANY SUBSTANTIVE EVIDENCE OF NEGLIGENCE OR CAUSATION.

1. The Legally Invalid Answers to the Hypothetical Question.

A summary of petitioner's medical evidence will be found at Sections 12, 13 and 14 of the Statement herein, *supra*. As is there indicated, petitioner's sole proof of negligence and causation is to be found, if at all, in the hypothetical question addressed to petitioner's doctors and their answers to it.

Respondent freely concedes in this connection that both Doctors Ippolito and Anderson would be fully qualified by reason of their medical training to testify on the basis of the hypothetical question that there was a proximate causal relationship between the insect bite and plaintiff's illness, *provided* they were able to state (which they were not) the medical cause of his illness. But when the doctors in a single answer purported to reach not only a conclusion on the medical subject but in addition to state that there was a direct causal connection between the stagnant pool and the presence of this particular biting insect upon petitioner's body, they ventured from their field of knowledge into a realm in which they themselves repeatedly admitted *having no specialized knowledge*.

On cross-examination of the doctors, questions were addressed to them which sought to establish the manner in which they arrived at their conclusion that the biting insect had come from the pool prior to getting on petitioner's person. Dr. Ippolito's response was limited to the following brief sentence:

> "We do know that stagnant pools of water, particularly that are infected and have rodents, rats in them, that insects will go to that area more so than in a dry, clean area." (R. 222.)

But when pressed for his knowledge as to "*what types*" of insects such conditions would attract, the doctor, after mentioning mosquitoes and flies, stated that such conditions would attract "Any type of a bug—Just any type at all." (R. 223.) Of course such testimony is manifestly absurd and fallacious on its face,* and yet it is solely upon such evidence that petitioner would have this Court take over $625,000.00 away from respondent and award it to him.

Dr. Anderson's reasoning was on a similarly generalized and fallacious basis. (R. 261.) He also testified as follows:

> "Q. So that there are certain *recognized* diseases which can be traced to particular insects?
>
> A. There are a certain number, yes.
>
> Q. You haven't found any such disease in the case of Mr. Gallick, have you?
>
> A. No, sir." (R. 263.)

Thus the doctors admittedly have no knowledge that petitioner suffers from an insect-borne disease at all.

Both Doctors Ippolito and Anderson repeatedly conceded that they had no specialized knowledge in the field of entomology, which is the study of insects and their habits. (R. 197, 261, 263, 271, 272.) Indeed, their ignorance of the field was such that neither could suggest *any kind* of insect which is a half inch in diameter and two inches long, the size assumed in the hypothetical question, and both disclaimed *any knowledge of what the habits or living conditions of such an insect would be.* (R. 197, 222, 224, 270-1.) Thus they could have no valid opinion of its probable source.

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* "A vast number of insects only exist in association with vegetation." (12 *Encyclopaedia Britannica*, 419 (1941).)

It is axiomatic that an expert cannot go outside his specialty, even in part, in rendering an opinion, and that when he does, his opinion is not regarded as substantial evidence. And even when he stays within his field his opinion is likewise without weight if it is based in some part upon admitted ignorance or is otherwise purely speculative or opposed to the dictates of common sense. The general rule of law applicable here is concisely stated in the case of *United States v. Thornburgh*, 8th Cir., 111 F. 2d 278, 280, cert. den. 311 U. S. 664 (1940), which involved medical opinion testimony:

> "A reviewing court, however, is not always required to accept as substantial evidence the opinions of experts. 'Where it clearly appears that an expert's opinion is opposed to physical facts or to common knowledge or to the dictates of common sense or is pure speculation, such an opinion will not be regarded as substantial evidence.' Svenson v. Mutual Life Ins. Co. of New York, 8 Cir., 87 F. 2d 441, 445. See also United States v. Hill, 8 Cir., 62 F. 2d 1022, 1025; United States v. Doublehead, 10 Cir., 70 F. 2d 91, 92."

To the same effect are: *Rhodes v. United States*, 4th Cir., 282 F. 2d 59, 62, cert. den. 364 U. S. 912 (1961); *Washington v. United States*, 9th Cir., 214 F. 2d 33, 43, cert. den. 348 U. S. 862; *Kauk v. Anderson*, 8th Cir., 137 F. 2d 331, 334 (1943); *Ensign-Bickford Co. v. Reeves*, 8th Cir., 95 F. 2d 190, 195 (1938); *Atlantic Life Ins. Co. v. Vaughan*, 6th Cir., 71 F. 2d 394, 395-6, cert. den. 293 U. S. 589.

Nor was the jury in any better position than the doctors to infer foreseeability or a causal connection between the property conditions and the biting insect. There was no showing that the object felt by petitioner was a species of insect whose habits, origins, and biting abilities or propensities are of common knowledge. Again, the only

qualified expert on insects (Dr. Stearns) stated directly that the property conditions complained of would *not* attract any insect of the size described by petitioner, nor a biting insect of any size other than common mosquitoes.

2. There Was No Competent Factual Proof to Support the Doctors' Reasoning Process.

Stripped to its bare essentials, the doctors' reasoning process—petitioner's *sole* proof of foreseeability, negligence, and causation—may be reduced to the following simple syllogism: *Major premise*: Property conditions like those on respondent's premises are known to attract *some* species of insects and harbor *some* types of disease, none of which is known to be involved in petitioner's case or has ever been found on respondent's property. *Minor premise*: Petitioner was bitten by an unidentified insect near such property conditions, and he suffers from an illness of unknown cause. *Conclusion*: Therefore, the unidentified insect transmitted the unknown disease from the pool to petitioner, and it was reasonably foreseeable that it would do so.*

If this represents a logically sound and scientifically defensible reasoning process (as petitioner must neces-

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* The legal unvalidity and lack of weight of such testimony is well stated in the case of *United States v. Hill*, 62 F. 2d 1022, 1025-6, which involved medical opinion testimony:

> "* * * 'So that obvious error of opinion, opinion based on insufficient data, or nonsense clothed in words of "learned length," may be disregarded by this Court as a basis for supporting a verdict.'
>
> * * * * *
>
> "Necessarily, the weight of the opinion of an expert depends largely upon the facts upon which it is based. * * * If not justified by the evidence or by reason, it is entitled to no weight. * * * It is safe to say that an opinion rises no higher than the level of the evidence and the logic upon which it is predicated."

sarily claim), why was no *competent* proof introduced to support it? Why did petitioner call no qualified entomologist to testify that there are types of insects of the size described by petitioner which are indigenous to northern Ohio and which characteristically attack, bite, or sting human beings; that such insects feed on decayed animal matter and/or thrive on stagnant water, preferring that environment to the weeds and vegetation found everywhere in summer, including the Cleveland Flats? Why was there no testimony which would permit the jury logically to infer that the existence and habits of such insects are so commonly known as to place respondent upon notice that its property conditions would expose its employees to an unreasonable risk of harm therefrom? And assuming it could be proved that such risk *was* notorious, why did not petitioner also attempt to establish that the elimination of this *single stagnant pool* would have appreciably reduced the numbers of such insects and the likelihood of insect bite to its employees? The answer to these questions—totally ignored by petitioner in any brief to date—is as simple as it is obvious: no *qualified* expert entomologist could honestly give testimony on these subjects which would have been favorable to petitioner's case. On the contrary, the only *competent* entomological testimony, that of Dr. Stearns, flatly contradicted the premises and reasoning process of Doctors Ippolito and Anderson and showed that their supposed conclusions were based on half-truths, supposition and ignorance, rather than on scientific knowledge, logic and fact. (See Section 15 of the Statement, *supra*.)

From the foregoing, it is clear that there was no evidence presented from which it can be inferred with reason that respondent, in the exercise of reasonable care, should have foreseen injury to its employees from the condition of

its premises, nor that petitioner's illness did in fact come from respondent's premises or from any other outside source. Therefore, there is no legally sufficient proof of negligence and causation in this record.

E. THE JURY VERDICT IS LEGALLY INSUFFICIENT TO SUPPORT A JUDGMENT FOR PETITIONER, AND SUPPORTS THE JUDGMENT FOR RESPONDENT.

There was no general verdict.* The jury's verdict consisted of its findings in response to 23 questions composed and submitted by the trial court.

In answer to Questions 1, 5, 6, 7 and 8, the jury found that a pool of stagnant water existed on B. & O. premises, in which dead pigeons, dead rats, vermin and bugs accumulated. Having made these findings the jury then further found:

> "20. If the answers to any one of the questions numbered 1, 5, 6, 7 and 8 is yes, was there any reason for the defendant B. & O., to anticipate that such would or might probably result in a mishap or an injury?
>
> A. No." (R. 561.)

The resolution of this issue was also confirmed by the negative finding in answer to Question 22, which again inquired about foreseeability of injury. (R. 561.)

In response to Question 13, the jury was unable to agree that the workplace was unsafe, as follows:

> "13. Did the defendant B. & O., provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?
>
> A. Jury can't decide on this question." (R. 560.)

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* For this reason the cases cited by petitioner relating to the principle that answers to interrogatories should, if possible, be interpreted in a way consistent with the *general* verdict, do not apply.

Thus the jury found directly that there was no reason for respondent to foresee "a mishap or injury" from the stagnant pool with its accumulated dead pigeons, dead rats, vermin and bugs.* Further, the jury could not agree, and in effect stated that petitioner had not proved to their satisfaction, that respondent had failed to provide petitioner with a reasonably safe place to work, which by any fair analysis of the pleadings and evidence was the only substantive neglect alleged and submitted.

Even in seaworthiness cases where the employer is held to an insurer's duty to provide a safe ship, it has been determined by this Court that the mere happening of an accident and injury on board is not sufficient to impose liability, and that where the trier of the facts determines that "what happened was an unexpected, isolated occurrence" due to the "unforeseeable introduction of a noxious agent from without," there is no liability. *Morales v. City of Galveston, supra* (370 U. S. 165, 169, 171, 82 S. Ct. 1226).

In cases such as the case at bar, where the employer is not an insurer but is liable only for negligence, it has always been held that a jury determination that there was no reason to anticipate or foresee any mishap or injury negates negligence and legal liability as a matter of law. *Inman v. Baltimore & Ohio R. Co., supra* (361 U. S. 138, 140); *Ringhiser v. Chesapeake & O. R. Co., supra* (354 U. S. 901, 903, 905); *Rogers v. Missouri Pacific R. Co., supra* (352 U. S. 500, 503); *Dalehite v. U. S., supra* (346 U. S. 15, 42); *Brady v. Southern Ry. Co., supra* (320 U. S.

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* Section 2315.17 of the Revised Code of Ohio, as does Rule 49(b) of the Federal Rules of Civil Procedure, provides that a special finding of the jury shall control its verdict, as follows:

> "When a special finding * * * is inconsistent with the verdict, the former shall control the latter, and the court may give judgment accordingly."

476, 483); *Green v. American Tobacco Co.*, 5th Cir., 304 F. 2d 70, 76-7; *Republic of France v. U. S.*, 5th Cir., 290 F. 2d 395, 399-401, cert. den. 369 U. S. 804 (1962); *Siegrist v. Delaware, etc. R. Co.*, 2d Cir., 263 F. 2d 616, 618-9, cert. den. 360 U. S. 917; *Merrill v. Beaute Vues Co.*, 235 F. 2d 893, 896; *Prosser on Torts*, 2d Ed. pp. 119-121, 274-6, 323-4 (animals and insects); 2 *Harper & James, Torts*, pp. 929-30, 1134.

F. IN THE EVENT THIS COURT HOLDS THAT PETITIONER IS OTHERWISE ENTITLED TO FINAL JUDGMENT, THE CASE SHOULD NONETHELESS BE REMANDED TO THE OHIO SUPREME COURT FOR CONSIDERATION OF QUESTIONS OF OHIO LAW NOT HERETOFORE EXAMINED BY IT.

In its appeal to the Ohio Court of Appeals, respondent set forth a number of specifications of error (R. 620-2), involving, among others, errors with respect to the admission of evidence, interpretation of Ohio procedural statutes, and the excessiveness of the verdict. All of such specifications were dealt with in the following brief sentence of that Court's opinion:

> "All other claimed errors have been examined and we find none prejudicial to the rights of the appellant." (R. 628.)

The same errors committed by the trial court were subsequently made the subject of a cross-motion to certify filed by respondent in the Supreme Court of Ohio. (R. 636.) When respondent's cross-motion to certify was overruled by that Court (R. 639), respondent filed an application for a re-hearing thereof (R. 640-1), which was likewise denied. No reasons for rejection of the cross-motion were given in either instance.

Thus, if this Court should determine that petitioner's proofs and the verdict of the jury are sufficient to support

the trial court's $625,000 judgment, then unless this Court remands the cause to the Ohio Supreme Court, respondent will be confronted with final judgment without any authoritative decision of the court of last resort of Ohio on the numerous questions of Ohio law which that Court has heretofore declined to consider, and upon which this Court is powerless to rule.*

It should be emphasized, in this connection, that the Ohio Supreme Court's refusal to admit the case on respondent's cross-motion to certify does *not* imply that that Court has examined and rejected the errors therein asserted by respondent, for that Court has repeatedly ruled that its denials of motions to certify (which invoke only a discretionary review) by no means indicate agreement with or affirmance of the judgment below. *Swetland Co. v. Evatt*, 139 Ohio St. 6, 18, 37 N. E. 2d 601, 606-7; *Keesecker v. G. M. McKelvy Co.*, 141 Ohio St. 162, 169, 47 N. E. 2d 211, 215; 4 *Ohio Jurisprudence* 2d, Appellate Review, § 1198, p. 559.

It is thus entirely possible that the Ohio Supreme Court's denial of the cross-motion to certify was occasioned by that Court's view that the errors claimed by respondent, though otherwise prejudicial, were academic in the light of the final judgment for respondent entered below. Where such is the case, this Court has frequently remanded to the court below for proceedings not inconsistent with its opinion. *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 109; *Dean Milk Co. v. Madison*, 340 U. S. 349, 356-7; *Nostrand v. Little*, 362 U. S. 474, 475-6. The

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* *Seaboard Airline Railway v. Padgett*, 236 U. S. 668, 671; *Seaboard Airline Railway v. Duvall*, 225 U. S. 477, 485-8; *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 509, 515-16; *Rogers v.* Thompson (Mo. Sup. Ct.), 308 S. W. 2d 688, 690-1; *United States ex rel. Pascal v. Burke*, 90 F. Supp. 868, 871; and see *Phillips Co. v. Dumas School District*, 361 U. S. 376, 386.

same practice has been followed in actions arising under the Federal Employers' Liability Act. *Stinson v. Atlantic Coast Line Railroad*, 355 U. S. 62.

G. CONCLUSION.

If respondent's contentions are well taken with respect to any *one* of the three fundamental questions presented for review, the facts and law discussed above plainly require this Court to affirm. But it matters little which of the three is regarded as controlling, for when this record is read as a whole, the simple justice of the present result emerges inescapably. Not only was no evidence produced by petitioner to show that the conditions on respondent's property gave rise to a foreseeable risk of harm to employees, or in fact caused harm to petitioner, but the jury itself confirmed petitioner's failure of proof in finding that there was no reason for respondent to anticipate *any* "mishap or injury" therefrom. No court can now supply the omission.

Respondent fully appreciates the extent to which this Court's decisions, cited by petitioner, have relaxed common law requirements of proof in F. E. L. A. actions. But each and every one of those decisions is distinguishable from the present case in two vital respects. First, in none of them was it specifically found by the jury (the final arbiter, as this Court has so often held, on disputed issues of fact) that the indispensable element of forseeability was lacking. Second, and equally important, in each of those cases there is every reason to suppose that *all* evidence reasonably available to the parties and relevant to the disputed issues was before the court. Thus, although "a measure of speculation" may have been involved in determining causation, the jury was at least in a position to make the most "educated" possible guess from among the

conflicting inferences. But here, by way of contrast, petitioner's case remains mysteriously and suggestively silent with respect to essential facts which, if favorable to his interest, were readily susceptible of competent and persuasive proof. There can be only one explanation of petitioner's omission: The bedrock scientific facts were directly contrary to those which petitioner had to prove in order to prevail.

Respondent is unwilling to believe that this Court's prior decisions require judgment for petitioner on a record as incomplete as this. To so hold would be to enshrine ignorance, half-truth and concealment at the expense of scientific knowledge, logic and fact.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 76.

JAMES GALLICK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO,
EIGHTH JUDICIAL DISTRICT OF OHIO.

REPLY BRIEF OF PETITIONER.

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INTRODUCTORY STATEMENT.

The purpose of this reply brief is analyze the factual presentation contained in the brief of respondent and discuss questions of argument raised in the brief of respondent which were not discussed in the brief of petitioner on the merits.* Insofar as possible, repetition of petitioner's brief on the merits will be avoided except when necessary for purposes of clarity or continuity.

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* Abbreviations

Respondent's Brief on the Merits RB;
Petitioner's Brief on the Merits PB;
Printed Record R;
Plaintiff's Exhibits PX
Defendant's Exhibits DX.

STATEMENT.

Respondent on page 3 of its brief introduces its statement of facts as follows:

> "The statement will contain only such facts as are established either by the uncontradicted evidence or by resolving all conflicts in petitioner's favor, as this Court is required to do." (RB 3.)

After giving lip service to this fundamental doctrine, respondent then proceeds to present only those facts supporting its position. Interspersed with the factual references to the record are the editorial comments of respondent's counsel, all of which creates a misleading and confusing picture of the case as it was presented to the jury. Most of the factual presentation from the record by respondent consists either of respondent's cross-examination of witnesses to develop facts favorable to it, or the direct testimony of respondent's witnesses likewise tending to develop facts favorable to respondent. Much of the evidence favorable to petitioner was omitted from respondent's statement contained in its brief.

THE ISSUES FRAMED BY THE PLEADINGS.

The Trial Court submitted two specifications of negligence to the jury which are contained in their entirety on page 3 of respondent's brief. (RB 3.)

After reciting in its brief these two specifications of negligence, respondent then proceeds to editorialize in the following manner:

> "* * * it is clear that the gist of petitioner's cause of action presented but a single claim of negligence: that respondent 'knew' that by permitting unsanitary conditions to exist on its premises it would attract insects *harmful to man*, thereby creating an unreasonable risk of harm to its employees, including petitioner, * * *." (RB 3.) (Emphasis added.)

It is vital here to note that respondent chooses to add to the issues as framed by the pleadings an allegation referring to insects "harmful to man." Such an allegation nowhere appears in the petition nor in the specifications of negligence as submitted to the jury. This distinction is very important because in fact the gist of petitioner's claim was not the species of the insects attracted to the cesspool, *but the character of the cesspool itself.* The negligence claimed was in requiring petitioner to perform work duties close by a cesspool containing quantities of dead pigeons, rats, bugs and vermin, which cesspool as thus described was on railroad property under the control of respondent. (R. 3, and the special verdict, questions 1 through 12, R. 7 and R. 8.)

It requires, of course, no citation of authority that the knowledge referred to in specification of negligence number 6 as submitted to the jury may be actual or constructive. There was ample evidence in the Record that the conditions complained of existed for many, many years

without affirmative action to remedy the same on the part of respondent. The issue of knowledge or notice was resolved by the Court of Appeals against Respondent with the following statement:

> "We do know by overwhelming testimony that the pool of stagnant, vermin-infested water was alongside the Baltimore and Ohio tracks for many years prior to the alleged 'bite' suffered by Mr. Gallick. We know, by definite evidence, that insects were in and about this stagnant pool." (R. 626.)

THE FACTS.

In its brief, particularly pages 4 through 8, respondent indulges in a lengthy dissertation about the geography of the flats area of Cleveland and those portions of its right-of-way wherein petitioner, during the course of his working day, would have occasion to perform work duties. The obvious purpose of reference to this evidence is to suggest other sources of unsanitary conditions, besides those existing under the Columbus Road Bridge, which might have exposed petitioner to contamination.

Thus respondent makes reference to the fact that raw untreated sewage was being dumped into the Cuyahoga River, and further asserts "even closer at hand was a garbage dump at which rats and pigeons were accustomed to feed." (RB 5.) Further, respondent states:

> "The place at which petitioner was bitten is within 75 yards of the sewage-laden Cuyahoga River." (RB 5.)

Again on page 6 of respondent's brief, the following factual recitation is contained:

> "The old passenger station, so-called, is situated on Columbus Road, which is the main north-south artery on the east bank of the Cuyahoga, and the building is within 100 yards or so of the river itself." (RB 6.)

It is interesting to note, however, that respondent cannot point to any reference in the Record of any of these areas containing quantities of dead pigeons and rats with various forms of bugs and insects crawling about the same.*

It is difficult for petitioner to grasp a fair comparison between the moving currents of the Cuyahoga River (with or without sewage) heading toward Lake Erie and the stagnant cesspool maintained under the Columbus Road Bridge by respondent. Furthermore, it was undoubtedly difficult for the jury to grasp the likelihood of the biting insect coming from a great distance away, where petitioner may earlier have been working, when the place where he was bitten contained quantities of dead pigeons and rats with insects only a track width or approximately 10 feet away.

Later respondent makes the following fact allegation:

> "After leaving his lunch pail on the diesel, petitioner proceeded on foot to supervise some switching which was to be done in the 'spur yard' located west of the Seneca Street yard office, south of Columbus Road, and *immediately adjacent to the Cuyahoga River,* which at this particular point in its meandering northward course runs approximately east to west." (RB 8.)

Again, the purpose of this testimony was to suggest to this Court that there may have been a contaminating source by the River which could account for petitioner being bitten at a place other than under the Columbus Road Bridge or, at least, the insect getting on petitioner's pants leg at a place other than under the Columbus Road

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* Perhaps other property owners in the Flats did not permit dead animal matter to lay unattended until the hides rotted as did respondent.

Bridge. However, a close study of the Record references cited on page 8 of its brief by respondent fails to disclose that petitioner himself was immediately adjacent to the Cuyahoga River; in fact, it does not disclose how close petitioner was to the Cuyahoga River. Certainly the Record is completely silent as to whether there were any contaminating sources and particularly any insects of the character which bit petitioner in such areas. Thus again the jury was certainly entitled from the Record to reject respondent's argument of other contaminating sources and accept the overwhelming evidence that the most logical contaminating source was the cesspool itself. This Court has repeatedly held that such a choice must be by the trier of facts where the evidence and reasonable inferences to be drawn from the evidence is in conflict. See for example PB 28-33.

It is illogical to assume that the biting insect got up petitioner's pants leg at some other place but waited until he took his "one or two steps" under the bridge before inflicting upon his person the bite. It is logical to conclude that if the insect crawled up the inside of his khaki pants leg petitioner would not feel any movement. When he took his one or two steps this would cause the inside of his pants leg to brush up against his bare leg which, of course, could well be a source of irritation to any insect causing the same to bite him.

With reference to its property under the Columbus Road Bridge, respondent describes it as follows:

> "Respondent's property at this point is approximately 25 feet wide and is occupied by the river track, a single set of rails, which pass under the bridge." (RB 8.)

This fact recitation completely omits the all-important consideration that the cesspool and the drainage ditch

leading from the cesspool to a drainage manhole were likewise on respondent's property and under the direction and control of respondent. (R. 571, PX 12.) Inasmuch as the entire gist of petitioner's cause of action is founded upon respondent's negligence in the maintenance of this portion of its right-of-way, this omission is of vital importance.

On page 10 of its brief respondent sets forth a quote from page 157 of the Record to create the impression to this Court that petitioner did not even know that he was bitten by an insect. However, respondent in its brief failed to quote the rest of Record page 157 with the following testimony of Petitioner on cross examination:

> "Q. Do you recall, you were able to describe the size of it, weren't you, on your direct examination?
>
> A. Yes.
>
> Q. It was about 2 inches long and about half an inch in diameter?
>
> A. Yes.
>
> Q. Do you recall ever having seen under the bridge anything that looked as you have described the insect felt?
>
> A. Well, I have seen that size crawling on these dead hides.
>
> Q. You have?
>
> A. I have." (R. 157.)

Respondent claims that the witnesses were in accord that for many years prior to August 1954, there had existed a "small" standing pool of "drainage" rain water beneath the Columbus Road Bridge and that in the shade of the Bridge, it never dried up completely even in dry summer weather like that which preceded the alleged insect bite. (RB 11.) Respondent makes no reference to the Record to support this alleged factual recitation; in fact, the same is contrary to the great preponderance of the

evidence. This *stagnant* pool of water was not "small." See for example, petitioner's exhibit 12 (RB 71), a scale survey of the area involved which shows that the cesspool of contaminated water covered virtually the entire right-of-way underneath the Bridge west of the track. From this scale survey the swamp area or cesspool measures approximately 60 feet in length and 18 feet in width. Likewise, petitioner's Exhibits one through four, which are large photographs depicting the area, demonstrate that this was not a "small" standing pool of "drainage rain" water. Because of the bulk of these photographs they could not be included in the printed Record but counsel for both sides have agreed that the same may be viewed by the Court and used in argument by stipulation.

It was not the "shade of the Bridge" which kept this cesspool from drying up even in dry summer weather. The testimony established that it was the depressed level of this area under the Bridge as distinguished from the higher level of the drainage ditch which produced this collection of water, which is the reason that Engineer Neff suggested raising the level of the area so that the water could drain downhill. There was also testimony from its own employees that respondent permitted the manhole into which the drainage ditch emptied to become plugged. (R. 314, 315). (R. 354.)

With reference to the number of dead pigeons, the presence of dead rats, and the number of insects, though different witnesses may have their own opinions as to the numbers collected at different times, there was no substantial dispute that there were always some dead rats, dead pigeons, and insects in and about the area.

With reference to passers-by on the overhead street throwing rubbish and garbage onto the track below (RB 11), the testimony was that this did not create the hazard

because the garbage and tin cans thrown off the Bridge went into the ditch, were washed down into the drain, and were cleaned out by the section crew (R. 315). In fact, there wasn't any testimony in the Record that in the cesspool itself, or in the area where petitioner was bitten, there were any accumulations of garbage.

Respondent discusses the question of a slag fill to eliminate the cesspool and then to rebut the testimony of Engineer Neff that the same was practicable, respondent states as follows:

> "Later uncontradicted testimony disclosed that such filling would have caused 'pumping' or vertical movement of the ties and track during the passage of trains and thus created a risk of derailment." (RB 13.)

This so-called "uncontradicted testimony" was the testimony of the section foreman, Paul Delaria, which respondent neglected to buttress by the testimony of any competent civil engineer, although by the admissions of Delaria such testimony was available to respondent (R. 301). At best from respondent's point of view, the issue of proper maintenance procedures to eliminate the cesspool created a question of fact for the jury which was charged with the duty of passing upon the credibility of Neff as a witness and Delaria as a witness.

Respondent then, to buttress its defense of lack of notice refers to its witness, the union griever, that complaints of the conditions claimed by petitioner to exist under the Columbus Road Bridge (which claims were supported by Molnar, Rady and Clason) were never reported to the griever "despite elaborate grievance procedures." The griever in question was witness Joseph Patrick Corrigan called by the defense. Witness Corrigan, however, also testified as follows:

"Q. And those two or three dead pigeons that you saw, at the most at any one time, when did you see two, where did you see one, and where did you see the other?

A. Well, somewhere in that area laying on the ground. I just couldn't pinpoint where.

Q. How close can we get to the ditch?

A. I just couldn't pinpoint where I saw the one today and where I saw it the next day.

Q. Would you see that often, or would it be cleaned up and be nice and clean?

A. *I never saw it cleaned up.*

Q. *You never saw it cleaned up. You mean they were there all the time?*

A. *They would be there until they disintegrated or rotted or whatever happened.*

Q. *They lay there until they rotted and disintegrated, is that right, Mr. Corrigan?*

A. *Yes.*

Q. *And you worked in that area how long, sir?*

A. *Since 1941, 19 years.*" (R. 347.) (Emphasis added.)

Further in the cross-examination of witness Corrigan, his signed statement was produced and identified as petitioner's exhibit 24-A (R. 602, 603) and the witness was examined as follows, in part:

"Q. Now, we will go over to the next sentence: 'There has been dead birds and pigeons there, also, and perhaps the insects have come from that.' Did you say that?

A. Yes, I did.

Q. 'The only thing the railroad would have to do to get rid of this pool of water and sewage and other dead animals and birds would be to put in a sewage system.'- Did you say that?

A. Yes, I did.

Q. Did you further say, 'There may be a sewage

system there, but it may be clogged up.' Did you say that?

A. Yes, sir." (R. 353-354.)

Further witness Corrigan testified as follows:

"Q. And as safety man, you, your job was to report all unsafe conditions to the company on behalf of your co-workers, isn't that a fact?

A. Yes, sir.

Q. Did you ever report to the company anything about the condition that I just read to you from in your statement?

A. No, sir." (R. 355.)

Respondent attempts in its brief to attack petitioner's testimony on the medical causal relationship between the conditions complained of and his illness. (RB 14-21.) For example, respondent states to this Court as an alleged fact:

"By this time a large skin ulcer had developed on his left leg, but others *shortly* followed on far removed parts of his body, *where there was no claim of any bite*, such as under the left arm and on the right leg (R. 580)." (RB 14.) (Emphasis added.)

Examination of the Record (R. 579) discloses that petitioner had a biopsy of an ulcer of his left leg at Marymount Hospital on September 22, 1954.* There was a debridement of this ulcer on September 28, 1954. There was a skin graft split thickness type performed surgically on October 12, 1954. *It was not until after October 12, 1954, and these purported attempts at surgery, that additional lesions were noted on petitioner's body.* Thus, the Record (579) shows the excision of a lesion of the left side of the neck on October 22, 1954, and the excision of multiple ulcers on November 23, 1954. The reference on page 14 of

* The date of the bite was fixed as approximately August 10, 1954 (Exhibit J, R. 10).

respondent's brief to page 580 of the Record pertaining to multiple areas of pyoderma granulosa were from a history and physical examination performed January 4, 1955. (PX B-2, R. 579, 580.) This hardly supports respondent's contentions that other ulcerations "on far removed parts" developed "shortly" after the ulceration complained of. Furthermore, the testimony of Dr. Ippolito discloses, with reference to his examination of September 16, 1954 (R. 174) as follows:

> "Q. When you examined him that day did he have one or more than one lesion?
>
> A. Just one.
>
> Q. And did you examine his body besides that area?
>
> A. Yes, yes, sir." (R. 174.)

Respondent then makes references to those portions of the Record in which petitioner's illness was described as "pyoderma gangrenosa" and that all of the doctors "agreed that this term was nothing more than descriptive of his symptoms." (RB 15 et seq.)

While respondent is correct in this contention, the inference which respondent attempts to create from its brief is that because the diagnosis of an illness is descriptive, such illness may not be causally related to trauma. Reported cases are to the contrary. Thus, medically Buerger's Disease is known as "thromboangiites obliterans" which is defined in the medical dictionary (for example, *The American Illustrated Medical Dictionary*, Dorland, 22nd Ed., 1951) as "an inflammatory and obliterative disease of the blood vessels of the extremities, more frequently the lower extremities, running chiefly in young men and leading to ischemia of the tissue and gangrene. Called also Buerger's disease and pre-senile spontaneous gangrene." This is purely a descriptive diagnosis, and in

fact, admittedly in the medical profession, the etiology of Buerger's disease is unknown. Nevertheless, this Court found little difficulty in holding that a cause of action for aggravation of a pre-existing Buerger's Disease may be stated despite its unknown etiology. See for example, *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, 81 S. Ct. 6 (1960).

In the case of *Braun v. Roux Distributing Co., Inc.*, 312 S. W. 2d 758 (Mo. 1958), plaintiff contracted a rare disease known as "Allergic Periarteritis Nodosa"* allegedly from the use of defendant's oil shampoo tint. The case reports extensive medical testimony by both sides with all doctors admitting that the etiology of the disease was unknown but the prevailing medical *theory* was that the disease was caused by allergy. Plaintiff's medical experts testified that plaintiff contracted the disease because the product contained an allergen, *although there were no prior cases in medical case history where this allergen had ever before been known to cause this particular disease.* The Supreme Court of Missouri rejected a contention that the verdict in favor of plaintiff could only be arrived at by speculation and guesswork, but on the contrary took the position that the jury could well find sufficient evidence of substantial probative force of causal connection to justify the verdict.

Although the etiology of cancer is by common knowledge in the realm of the medical unknown, there are many recent cases which have affirmed substantial verdicts for plaintiffs on medical opinion that a particular trauma bore

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*"An inflammatory disease of the coats of the small and medium sized arteries of the body with inflammatory changes around the vessels and marked by symptoms of systemic infection." (*The American Illustrated Medical Dictionary*, Dorland, 22d Ed., 1951.)

a causal relationship to the resulting cancer. See for example, *Peterson v. Kansas City Public Service Co.*, 259 S. W. 2d 789 (Mo. 1953); *Menarde v. Philadelphia Transportation Co.*, 103 A. 2d 681 (Pa. 1954); *Lee v. Blessing*, 41 A. 2d 337 (Conn. 1945).

Another disease entity in a descriptive etiology classification is "Reflex Sympathetic Distrophy" sometimes known as "Causalgia." With the basic etiological factor being unknown, medical testimony of causal relationship has been sufficient to sustain a verdict. See for example, *Bowers v. Pennsylvania Railroad Company*, 182 F. Supp. 756 (1960); *Rice v. Louisville and Nashville Railroad Company*, 131 N. E. 2d 808 (Ill. 1956), both of the foregoing being F. E. L. A. cases.

It is useless to belabor this brief with additional factual examples as no two cases are exactly alike on their facts. The foregoing are at least illustrative of the prevailing modern legal theory that a precise medical etiology is not a condition precedent to the recovery of damages. Clearly in the instant case, with positive direct testimony by treating physicians of a medical-legal causal relationship between petitioner's condition and his illness there was sufficient evidence for the jury and the Trial Court to reach a conclusion of causal relationship. (PB 14, 15.)

Apparently in recognition of this deficiency in its argument, respondent seeks to attack this testimony of a direct causal relationship by the simple statement that a lack of specialized knowledge of insect life by petitioner's physicians disqualifies said physicians from expressing expert opinion on the issue of causal relationship. Respondent argues that only an expert entomologist would be qualified to give expert opinion on the subject. (RB 21.) While it is a general legal truism that an expert witness must be an expert to give opinion evidence in answer

to a hypothetical question, it does not necessarily follow from this general proposition that only an entomologist is qualified to give opinion evidence as to whether the disease-producing conditions in the cesspool maintained by respondent could and did produce the illness suffered by petitioner. The Trial Court and the Court of Appeals took the position that there was no error in the hypothetical questions asked the physicians on this subject and that they were qualified to give expert testimony pertaining to same.*

In fact the entomologist called by respondent admitted that he was not qualified to give such an opinion. See for example, the following testimony (from the cross examination of Dr. Stearns):

"Q. Have you ever cultured dead rats?

A. I have taken only a four-hour course in bacteriology in pre-medical training.

Q. Four hour?

A. That is the regulation course.

Q. Have you ever cultured dead rats?

A. No.

Q. Have you ever cultured dead pigeons?

A. No.

Q. You do not know what if any bacteria would be prevalent or be found on decaying dead rats?

A. I cannot give an official opinion or professional opinion on it.

Q. You don't think you are qualified, is that it?

A. I am an entomologist.

Q. And the same with dead pigeons?

A. That's right." (R. 366.)

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* This issue was raised to the Court of Appeals by respondent's assignment of error No. 4 (R. 621), and to the Supreme Court of Ohio on respondent's cross motion to certify, cross assignment of error II (R. 636), and respondent's motion for rehearing, question (2) (R. 641).

With further reference to Dr. Stearns, the expert entomologist of respondent, he testified that in his experience a giant water bug in its largest size would not be over about an inch and a half (R. 372, R. 373), that such bugs "don't normally bite" and their ability to crawl is "very feeble." (R. 368.) To counter this testimony, petitioner produced James R. Skelly of the Museum of Natural History who brought with him a collection of specimens of aquatic bugs from the Museum, at least one of which measured two and one-half inches. Skelly testified from observation and experience as a collector that it is common practice for such a water bug in the Cleveland area to be that size (R. 498), they do crawl (R. 500), and he has been personally bitten by the species (R. 501).

We believe that any fair reading of the entire testimony of Dr. Stearns in conjunction with the Record as a whole makes it clear that there was substantial impeaching evidence to his testimony showing his bias toward respondent which flew him in from Newark, Delaware. Dr. Stearn's only exposure to the locale complained of was shortly before testifying (R. 361).

It is also not true, contrary to the assertion in Respondents' Brief that "according to the uncontradicted medical testimony, petitioner's life expectancy has been reduced to a 'probability' of about four or five years." (RB 14, 15.) This assertion comes from the following statement from respondent's medical expert, Dr. Davis, who testified:

> "Well, I think that this disease *may* continue over a period of the next four or five years hit something vital which will take his life." (R. 430.) (Emphasis added.)

However Dr. Davis later qualified even this speculative prognosis as follows:

"Q. Then is it not a probability that it will continue to be external, and not internal, probability, Doctor?

A. I think if put that way I would say there is a probability.

Q. That it will continue to be external?

A. Yes, sir." (R. 439.)

ARGUMENT.

A. The Issues as Presented to This Court.

Respondent apparently recognizing the weakness of the position of the Court of Appeals seeks to enlarge upon the issues presented by the judgment and journal entry of the Court of Appeals to which Court the instant writ of certiorari is directed. In support of its position in this regard, respondent states that:

> "It has been the undeviating rule of this Court that respondent is free to urge affirmance, and this Court is free to affirm, upon any ground which supports the judgment below, even though such ground may not have been considered by the lower court." (RB 27 and 28.)

In support of this proposition respondent first cites *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 233 (1931). This case was an action in the District Court for limitation of liability while a Jones Act action was pending in the State Court for personal injuries of the seaman. The Circuit Court of Appeals held that the District Court was without jurisdiction to entertain the petition for limitation of liability in the District Court. This Court held that it had the power to entertain the question of the jurisdiction of the District Court although the same was not being urged on the petition for a writ of certiorari because a federal question was presented. However, it must be noted

that even here this Court reiterated its long-standing rule of practice that:

> "A party who has not sought review by appeal or writ or error will not be heard in an appellate court to question the correctness of the decree of the lower court."

In the instant case, there is no cross-motion for certiorari pending by the respondent nor cross-appeal. As noted by Rule 19, Subsection 1(a), the sound discretion to review a case on certiorari from a state court is:

> "(a) Where a state court has decided a federal question *of substance* not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court." (Emphasis added.)

As we shall demonstrate, the only Federal questions in the instant case are whether questions of fact as to the negligence of respondent railroad were presented from the Record, and whether questions of fact on causal relationship between negligence and injury were presented by the Record in this action under the Federal Employers' Liability Act. Of these issues, petitioner takes the position that only the issue of causal connection is a federal question "of substance" as this was the sole ground on which the Court of Appeals reversed the judgment of the trial court.

Respondent next cites *Helvering, Comm. v. Gowran,* 302 U. S. 238, 58 S. Ct. 154 (1937). In this case, a reiteration was made of the general legal principle that in a review of judicial proceedings, the rule is settled that if the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason. The immediate question, however, before this Court was whether this principle could be applied to a review of decisions of the Board of Tax Appeals and certiorari was granted and a pronouncement made by this

Court that this principle does so apply. Again a substantial federal question was before this Court.

The final decision cited by respondent is *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U. S. 276, 81 S. Ct. 1316 (1961). In this case, the petitioner, an Indiana corporation, was seeking to enjoin respondent in the New Jersey Courts from selling below fixed prices under the New Jersey Fair Trade Act, but the New Jersey Courts refused to entertain the action because petitioner was not registered in New Jersey. The case involved an important Federal question; namely, interpretation of the "commerce clause" with reference to "drummer cases" and what constitutes "local business." However, the following from the majority opinion is relevant, page 284:

> "So even if the state court had rested its conclusions on an improper ground, this court could not, in view of the undisputed facts establishing its validity declare a solemn act of the State of New Jersey unconstitutional."

Thus, in summary all of the precedents cited by respondent concern substantial Federal questions which this Court considered itself called upon to pass upon. Respondent now seeks to extend this principle to a request of this Court to consider questions of procedure in the Ohio Courts and interpretations of Ohio Trial Procedure Statutes, although no claim is made by respondent that such statutes are unconstitutional, or in any way involve a Federal question. A review by this Court of such questions of Ohio Procedure, would appear to be clearly outside of the purview of the Act of June 25, 1947, c. 646, 62 Stat., 929, Title 28, USC Sec. 1257 establishing jurisdiction in this Court on writ of certiorari to review decisions by the highest court of a state in which a decision can be had where questions arise under the Constitution or the Stat-

utes of the United States. Especially would this be so in the instant case where respondent has had a complete appellate review in the Ohio Courts on all of its claims of error concerning the procedural aspects of this case. Respondent itself concedes this to be the law. (RB 43, and footnote citations.)

B. There Was Ample Proof of Railroad Negligence to Support Petitioner's Claim Under the Federal Employers' Liability Act.

Respondent takes the position that petitioner's basic theory of negligence is that respondent "knew" that the alleged unsanitary conditions on its premises would attract insects "dangerous to humans," and that petitioner was bitten and diseased by one of the insects so attracted. (RB 28.) Examination, however, of the amended petition which framed the issues for the jury makes it rather clear that petitioner did not at any time allege or claim that insects "dangerous to humans" formed the basis of his cause of action. *It is not the character of the insect, but the character of the premises which forms the basis for petitioner's cause of action.* While it may be true, as claimed on page 29 of respondent's brief, that the mere presence of unidentified insects does not imply danger, we do believe that it is common experience that the presence of a cesspool containing quantities of rotted hides of dead pigeons and rats with various forms of insects crawling about the same, do imply an unsanitary, unhealthful condition capable of producing disease. This is especially so in the instant case when competent medical witnesses testified that this was in fact the cause of petitioner's illness.

However, we further believe, contrary to the assertions reiterated throughout respondent's brief, that expert

testimony would not be necessary for the jury to reach such a self-evident conclusion. Thus, in the recent case of *Salem v. United States Line Co.*, 370 U. S. 31, 82 S. Ct. 313 (1962), this Court re-stated the long-standing legal proposition that on matters knowledgeable to the ordinary mind, a jury is quite competent and permitted to draw an inference of negligence from existing physical facts without the aid of expert testimony. In that case, which was an action under the Jones Act, a seaman fell as he went to his post in the crow's nest. It was held error for the Court of Appeals to order a new trial on the ground that the jury could not determine, in the absence of supporting testimony by an expert in navel architecture, a claim that the shipowner had failed to equip the ship with necessary and feasible safety devices to prevent such a mishap. Substitute "entomologist" for "naval architect" and virtually the same legal proposition exists in the instant case. Clearly, the jury without the aid of expert testimony was capable of drawing the conclusion that the unsanitary conditions complained of were capable of and did, in fact, cause the disease complained of. Particularly so here where the initial lesion which ulcerated followed and developed in a close continuous time relationship to the bite.

Respondent attempts to support its position by citing cases dealing with dangerous co-employees. Since it is self-evident that a vicious employee is a responsible third person, we do not believe that such cases can be equated with the instant fact situation dealing with a static condition on premises under the control of respondent which produced the harm complained of. It is not important what species of insect bit the petitioner, or whether such insect would normally be of a class harmful to man. The important consideration is whether the insect did in fact

come from the deleterious condition of the railroad's premises which petitioner respectfully contends was a question of fact to be resolved by the jury and not by the reviewing court under the circumstances presented. (See Exhibit L, R. 10.)

It is, of course, well established by prior precedent that "injury" as used in the Federal Employers' Liability Act includes illness or disease resulting in whole or in part from a negligent condition of railroad premises. See for example, *Urie v. Thompson, Trustee*, 337 U. S. 163 (1949); *Young v. Pennsylvania Railroad Co.*, 197 F. 2d 727 (1952); *Cincinnati, New Orleans and Texas Pacific Railroad Co. v. Underwood*, 262 F. 2d 375 (1958); and *Atcheson, Topeka and Santa Fe Railroad Co. v. Preston*, 257 F. 2d 933 (1958).

Thus, assuming that a federal question is presented as to whether the Record in the instant case discloses negligence on the part of respondent railroad, we feel that there was ample evidence of such negligence and that further review on this issue is unnecessary. The jury specifically found negligence in one or more of the respects claimed in the petition (R. 11 and R. 12), the Court of Appeals in its review of the case likewise was satisfied that petitioner had met his burden of proof on the issue of negligence under the Act. (PB 29.) Inasmuch as the entire issue of causal relationship was discussed at length in petitioner's brief on the merits, further discussion here is not warranted.

C. The Jury Verdict on the Special Verdict Is Legally Sufficient to Support a Judgment for Petitioner and Does Not Support a Judgment For Respondent.

Study of the special verdict (R. 7 through 14) reveals that the jury in answer to special inquiry found respondent negligent and a proximate relationship between the conditions complained of and the present physical condition of plaintiff. Respondent, however, contends that the jury's answers on the question of foreseeability of harm foreclose a judgment in favor of petitioner and make mandatory a judgment in favor of respondent. Respondent vigorously pressed this point in its appeal to the Court of Appeals for Cuyahoga County and in its cross-motion to certify to the Supreme Court of Ohio.* At best, however, this issue raises questions of Ohio Procedural Law as to the rendering of final judgment upon findings of fact by the jury. See *Ohio Revised Code*, Section 2315.17. (Appendix G, of petitioner's brief on the merits.) The real issue here is what constitutes a determinatives issue under the Special Verdict Statute of Ohio, namely, *Ohio Revised Code*, Section 2315.15 (set forth in Appendix E of petitioner's brief on the merits). Quite obviously both the Trial Court and the Court of Appeals for Cuyahoga County took the position in this regard that the determinative issue was negligence, and the jury specifically having found negligence, the only remaining issue was one of causal relationship. Under Ohio Law, it is very clear that such answers of fact by the jury must be liberally construed to conform with the intent of the jury. See *Klever v. Reid Brothers Express, Inc.*, 151 Oh. St. 467, 86 N. E. 2d

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* See assignment of error 11 before the Court of Appeals (R. 621), cross assignment of error VIII to the Supreme Court of Ohio (R. 636), and question (1) of respondent's motion for rehearing to the Supreme Court of Ohio (R. 641).

608 (1949); *Elio v. Akron Transportation Company*, 147 Oh. St. 293, 70 N. E. 2d 898 (1947). The Federal view is substantially the same. See *Atlantic and Gulf Stevedores, Inc., v. Ellerman Lines Ltd. et al.*, 369 U. S. 355, 82 S. Ct. 780 (1962).

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment. *Arnold v. Panhandle & Santa Fe Railroad Company*, 353 U. S. 360. *Cf. Dick v. New York Life Insurance Company*, 359 U. S. 437, 446." (p. 355.)

The alleged issue raised by respondent of foreseeability is not a determinative issue at all under the Ohio Special Verdict Statute, *Ohio Revised Code*, Section 2315.15. Subsequent to the judgment of the trial court in the instant case, the Supreme Court of Ohio rendered its opinion in the case of *Miller v. McAllister*, 169 Oh. St. 487, 160 N. E. 2d 231 (1959). From that Opinion applying the rationale of the Court to a Federal Employer's Liability Act, particularly to the issues in the instant case, the determinative issues would be as follows:

1. Was respondent negligent in one or more of the particulars alleged in the petition?

2. Did such negligence result in whole or in part in injury to the petitioner?

(Cf. for example questions (1) and (2) of Respondents' Brief, pp. 1 and 2, as presenting the determinative issues of fact to be resolved by the jury.)

The substance of these determinative issues is contained in the Special Verdict form submitted by the Court and resolved by the jury in favor of petitioner herein.

[Exhibit P (R. 11, R. 12), Exhibit Q (R. 12), Exhibit R (R. 12), and Exhibit S (R. 12).]

To further buttress its argument of the necessity of a specific finding of foreseeability, respondent cites this Court to its recent decision, *Morales v. City of Galveston*, 370 U. S. 165, 82 S. Ct. 1226 (1962). We do believe, however, that a careful reading of the *Morales* case discloses that it is not precedent in support of the position urged by respondent in the instant case. The *Morales* case was an action in unseaworthiness by longshoremen for injuries from noxious fumes which occurred when fumigated grain was shot into the hold. The trier of fact was the District Court which found neither negligence nor unseaworthiness. As noted on page 167 of the Majority Opinion of this Court:

> "Specifically, the Court found that the City had not itself applied the fumigant to the grain in question, and that neither of the respondents knew, or in the exercise of reasonable care should have known, that the grain had been improperly fumigated at an inland point *by someone else*." (Emphasis added.)

Again, on page 171 of the Majority Opinion this Court stated:

> "What caused injury in the present case, however, was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent *from without*. The trier of the facts ruled, under proper criteria, that *The Grelmanion* was not in any manner unfit for the service to which she was put, and we cannot say that his determination was wrong." (Emphasis added.)

The Opinion in the *Morales* case makes it clear that where there is a defective or non-functioning part of a vessel, its appurtenance, or its crew, contributing to cause injury, then knowledge or notice is not necessary, and

hence, of course, neither would foreseeability be necessary. It is only because on the facts of the *Morales* case a toxic agent *without knowledge* to respondents was introduced by a responsible third person that the vessel was found to be seaworthy. It seems quite clear from a reading of the *Morales* case that had there been some defect in the vessel, its appurtenance, or crew, which contributed to cause the injury, then the decision would have been the other way. In the case at bar the cesspool with the rotted hides of dead pigeons and rats with crawling insects and the inadequate measures of respondent's section crew to clean up this health hazard are comparable to a defective vessel and crew of a ship. Most important, however, is that the *Morales* case itself dealt with a question of fact. In other words, the trier of fact did not find negligence or unseaworthiness. This Court merely affirmed the trier of fact. *In the case at bar, however, the trier of fact did find negligence and causal relationship. A reviewing court upset or set aside the finding of the trier of fact.* The *Morales* case therefore is hardly precedent for the issue presently before this Court.

D. There Is No Reason Contrary to the Assertion by Respondent That the Within Cause Should Be Remanded to the Ohio Supreme Court.

Respondent devotes the remainder of its argument to the proposition that unless this cause is remanded to the Ohio Supreme Court an affirmance of the Trial Court's judgment will confront respondent with a final judgment without any authoritative decision of the Court of Last Resort of Ohio on numerous questions of Ohio law. (RB 42-44.) Respondent readily admits that all of the various questions of Ohio Procedure are outside of the scope of review to this Court. (See footnote RB 43.) Of course, to

be consistent, respondent should have likewise conceded that the question of the sufficiency of the special verdict, the rulings of the Trial Court on the hypothetical questions to petitioner's physicians, and other matters of trial procedure, do not present judicial questions for review by this Court. Be that as it may, however, petitioner feels compelled to correct what may be an erroneous impression, namely that respondent has not had a final hearing in the Ohio courts.

The law is well settled in Ohio that a party has but one right of appeal and a party does not have the right to expect a decision by the highest Court of the State, nor is there any denial of an appellant's full rights when after a full, fair and thorough consideration of the issues by the Court of Appeals, further review by the Supreme Court of Ohio is deemed unnecessary. This is made abundantly clear from the recent case of *Williamson v. Rubich*, 171 Oh. St. 253, 168 N. E. 2d 876 (1960). From the per curiam opinion of the Court, the following, which thoroughly explains the Appellate Law of Ohio, is contained:

> "Section 6, Article IV of the Ohio Constitution, provides that judgments of the Courts of Appeals of this State shall serve as the ultimate and final adjudication of all cases except those involving constitutional questions, conflict cases, felony cases, cases in which the Court of Appeals has original jurisdiction, and cases of public or great general interest. *Except in these special circumstances, it is abundantly clear that in this jurisdiction a party to litigation has a right to but one appellate review of his cause.* (See, also, Section 2505.29, Revised Code.") (pp. 253, 254.) (Emphasis added.)

The procedural questions which respondent in its brief to this Court seeks to have this Court remand to

the Supreme Court of Ohio, do not fall within any of the classes of exceptions set forth in the above citation. By denying respondents cross-motion to certify and motion for re-hearing the Supreme Court of Ohio has already decided that such questions were not of public or great general interest so as to invest that court with jurisdiction. All of the procedural questions were given a thorough review by the Court of Appeals in the instant case and it was found by that Court that appellant did not present any question of error to its prejudice. Now in effect respondent asks of this Court that the case be remanded to the Supreme Court of Ohio which of necessity means respondent is asking of this Court that it find questions of public or great general interest under the Law of Ohio so to compel the Ohio Supreme Court to review the case when the Ohio Supreme Court itself did not find such questions to exist.

CONCLUSION.

Petitioner respectfully reiterates the position taken in his brief on the merits, namely that the facts disclosed in the Record support a judgment for petitioner on the only Federal questions presented, namely that the respondent was negligent in one or more of the respects claimed and that such negligence did in whole or in part produce the injury of which petitioner complains. While respondent is seeking to have this Court pass upon questions of Ohio Procedural Law, or in the alternative remand such questions to the Ohio Supreme Court, such would be inconsistent with any of the Federal questions involved and the role of this Court on a petition for a writ of certiorari raising strictly Federal questions. Furthermore, since all of these questions of Ohio Procedure which re-

spondent is seeking to re-litigate in this Court have been given a thorough review to the full extent provided under Ohio Appellate Law, further review in this respect is not warranted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 76.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO,
EIGHTH JUDICIAL DISTRICT OF OHIO.

REPLY BRIEF OF RESPONDENT.

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REPLY BRIEF OF RESPONDENT.

INTRODUCTORY STATEMENT.

Respondent files this reply brief for the purpose of calling the Court's attention to the numerous infirmities in the contentions made by petitioner for the first time in his reply brief.*

* The following abbreviations will be used in this brief:
Petitioner's Reply Brief—PRB.
Respondent's Brief on the Merits—RB.
Petitioner's Brief on the Merits—PB.
Printed Record—R.

PETITIONER'S THEORY OF THE CASE AND HIS FAILURE TO PROVE NEGLIGENCE.

(PRB, pp. 3, 20-21.)

With the filing of his reply brief petitioner has adopted a theory of his case, and has made admissions which throw into bold relief the fatal inconsistencies of his position. His basic theory, he now says, is that petitioner was required to work in the vicinity of a "cesspool" * containing insects and dead pigeons and rats, and that these conditions "imply an unsanitary, unhealthful condition capable of producing disease." (PRB. 20.) Thus, he claims that "it is not important what species of insect bit the petitioner, or whether such insect would normally be of a class harmful to man." (PRB. 21.) Indeed, he now even admits that the "presence of unidentified insects does not imply danger." (PRB. 20.) Thus, his theory apparently is that the evidence of the property conditions was sufficient proof of negligence, even though the unidentified insects thereon were all harmless to man. The fatal flaws in the theory are demonstrated by the case which petitioner himself pleaded and attempted to prove.

It is true that in the two specifications of negligence submitted to the jury (R. 540), it was alleged simply that petitioner's place of work was unsafe and unsanitary. However, the amended petition then went on to assert that "as the direct and proximate result" of the property conditions, petitioner "was caused to be bitten by an in-

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* Counsel's use of this word is characteristic of their distortion of the evidence; there is not a single word of testimony in this record, including that of petitioner's drainage engineer, to support the claim that this was a "cesspool," i.e. contained fecal material. On the contrary, there is no testimony whatever as to its source, and all concerned throughout the trial assumed that it was runoff and rain water.

sect, causing his illness." Similarly, petitioner's doctors in their answer to the hypothetical question (the sole proof offered on this feature of the case) testified that there was a causal connection between the property conditions, the presence of the biting insect, and the bite sustained by petitioner. Thus, both pleadings and proof explicitly recognized the absolute legal necessity of establishing that a *biting* insect was attracted by, present because of, and came from the pool.

Although petitioner now adopts the inconsistent theory that it was unnecessary for him to prove that the pool would attract harmful insects, he fails utterly to explain how a jury could logically conclude that respondent's premises presented a risk of harm to anyone in the absence of such insects. Certainly the property conditions did not constitute a health hazard in the absence of a *means of transmission* of the unidentified diseases, if any, in the pool. The uncontradicted testimony was that no employee was ever required to walk through the pool, or to come closer to it or remain near it any longer than did petitioner. (R. 308.) In addition, no testimony was given by any witness, lay or medical, with respect to any means of transmission of disease other than a biting insect or some other direct contact with a source of the disease. In the absence of testimony from petitioner's doctors, experts in the highly technical field of disease transmission, as to how and why diseases in the pool might be contracted by those *not* bitten by insects which came from it, the record is entirely devoid of any evidence that the pool was a health hazard to anyone.

But petitioner's assertion that it was unnecessary for him to show that respondent was on notice that its property conditions would attract *harmful* insects totally and

irretrievably destroys his case for an entirely different reason. *For unless it was proved that the biting insect was of a species normally harmful to man and that such insect was attracted by respondent's property conditions, then such insect must necessarily have been on respondent's premises for reasons entirely unconnected with the stagnant pool and dead animals.* In that event, any disease transmitted to petitioner by the insect must *necessarily* have come from a source other than the pool. The presence or absence of the pool could have had no conceivable effect whatever on the presence or absence of the insect, and petitioner would just as likely have been bitten if the pool had not been there.

Petitioner's dilemma could scarcely be more apparent. He contends on the one hand that this proof is unnecessary to his case, and on the other, relies upon his amended petition and his doctors' hypothetical testimony that there *was* a causal connection between the pool, the biting insect, and the bite. Evidently, however, this fatal and obvious inconsistency is a more confortable position for petitioner than would be the admission that the basic scientific facts with regard to insects are directly and categorically contrary to any likelihood of the presence of harmful insects. For if petitioner were now to admit that insects which attack man, a living being, are *not* attracted by or interested in *dead* animals and stagnant water, it would necessarily amount to a confession that the jury had been deliberately misled by the answers to the hypothetical question.

THE FACTS (PRB 4).

Contrary to petitioner's numerous assertions and suggestions (PRB 2, 4 *et seq.*), respondent's factual presentation in its opening brief *is* a full and fair summary of the record in this case, and respondent is content to rest its case on this presentation. A number of arguments made in petitioner's reply brief do, however, require a short rejoinder.

The Sufficiency of Petitioner's Evidence of the Cause of His Disease. At pages 12-14 of his reply brief, petitioner argues that it was unnecessary for him to establish that "pyoderma gangrenosa" has a known medical cause in order for his doctor to state that the disease was caused by the insect bite. In support of this contention, petitioner cites cases in which various diseases allegedly of unknown etiology were held to have been induced by trauma. All of those cases, however, are clearly distinguishable from the facts of the present case.

Thus, *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325 (PRB 13) did *not* involve the question of the *original cause* of Buerger's disease, but rather whether it could be aggravated by trauma, and there was medical testimony that any appreciable trauma will "frequently" cause such aggravation. (364 U. S. at 326.)

Similarly, in *Braun v. Roux Distributing Co., Inc.*, 312 S. W. 2d 758 (Mo. Sup. Ct., 1958), defendant's drug product contained a "known sensitizer," and the disease was medically associated with sensitization phenomena. Thus, there was proof of direct contact between plaintiff's body and the known source of a known causative agent of the disease.

Petitioner's citations of cancer cases (PRB 14) all necessarily involve a known and notorious medical entity,

its relationship to trauma being a much studied subject. Thus, the Court in *Menarde v. Philadelphia Transportation Co.*, 376 Pa. 497, 103 A. 2d 681 (1954), referred to the fact that there are "certain accepted criteria" on which there is a substantial consensus of medical opinion, which, when met, permit a conclusion of causation by trauma.

In the cases concerning "causalgia" (PRB 14) there is nothing whatever to indicate that the fact, if it be a fact, that the etiology of the disease is medically unknown was ever brought to the courts' attention or considered by them. *Bowers v. Pennsylvania R. Co.*, 182 F. Supp. (1960); *Rice v. Louisville & Nashville R. Co.*, 8 Ill. App. 2d 479, 131 N. E. 2d 808 (1956).

By way of contrast with the foregoing decisions the present case involves a disease so unique as to be entirely without precedent. As Dr. Ippolito said: "Nothing like this man has ever been written up in the medical literature." (R. 228.) A fair appraisal of the medical evidence discloses that petitioner's illness consists of a totally unexplained susceptibility to skin ulcers which have the appearance of those caused by non-infectious diseases, such as diabetes, as well as by infection. (R. 253-5, 205-6, 207-8.) The case is thus much more closely akin on its facts to those decisions in which the causes of systemic disease of unknown origin have been held by the courts not to present jury issues. See, for example, *In Re Sevigny's Case*, 337 Mass. 747, 151 N. E. 2d 258 (1958), in which there was held to be insufficient evidence of a causal connection between staphylococcus infection and leukemia; and *Puhl v. Milwaukee Automobile Insurance Co.*, 8 Wis. 2d 343, 99 N. W. 2d 163, 169 (Wis. 1959), involving the cause of Mongolism. In the latter case, the Court said:

> "While this court has gone a long way in admitting expert testimony deduced from well-recognized scientific and medical principles or discoveries, nevertheless the facts from which the opinion is made must be sufficiently established to have gained general acceptance in the particular medical field in which they belong." (*Id.* 169.)

The Testimony of Dr. Stearns. At pages 14-16 of the reply brief, petitioner attacks the testimony of Dr. Stearns on the ground, apparently, that he was not a physician and thus not qualified to express an opinion as to the connection between the "cesspool" and petitioner's disease. The short answer to this contention is that Dr. Stearns was called not to testify concerning petitioner's illness, but to give evidence concerning the character and habits of the various sorts of insects which would be attracted by the pool, and to testify that no such insects would be likely to attack or bite a human being. Respondent thus freely concedes that Dr. Stearns was not qualified on subjects medical, and suggests that petitioner should also concede that Drs. Ippolito and Anderson were not qualified to testify that the biting insect came from the pool.

ARGUMENT.

A. The Issues Presented to This Court. (PRB 17.)

Petitioner's opening brief was devoted in its entirety to the question of the sufficiency of the evidence of causation to take the case to the jury. In his reply brief, petitioner now for the first time takes the all but incredible position that this is the only federal question involved in this case. (PRB 17-20.) Petitioner is thus apparently asking this Court to hold that in enacting the Federal Employers Liability Act, Congress intended that only the employee's rights were federal rights, and that railroad

employer's rights, if any, are committed to the protection of the states. Merely to state this proposition is to demonstrate its absurdity. Yet it is perhaps a measure of petitioner's desperation that he should attempt in this manner to distract this Court's attention from the jury's findings as contained in the special verdict.

The briefest reference to this Court's prior decisions serves to demonstrate that the mutual rights and duties as between railroads and their employees under the FELA are *in their totality* federal rights, to be uniformly administered in all courts, state and federal. As this Court said in *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359, 361 (1951):

> "Congress in § 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this federal right shall be. *Chesapeake & Ohio R. Co. v. Kuhn*, 284 U. S. 44; *Ricketts v. Pennsylvania R. Co.*, 153 F. 2d 757, 759."

In the *Dice* case, the Court held that the question of the validity of a release was a federal question, a principle later extended in *Maynard v. Durham & Southern Ry. Co.*, 365 U. S. 160 (1961). It has likewise been held that state rules of procedure concerning the construction to be given pleadings must give way in FELA cases, since a "federal right cannot be defeated by the forms of local practice." *Brown v. Western Ry. of Alabama*, 338 U. S. 294, 296 (1949).

Manifestly, therefore, the first three questions set forth in respondent's opening brief (RB 1-2) are federal questions, since each involves an "incident" of the total FELA cause of action. Respondent has been scrupulously careful to relegate to its fourth question all specifications

of error which genuinely involve questions for the state courts of Ohio. Respondent thus submits that the sufficiency of the evidence on negligence and causation, and the sufficiency of the special verdict to support a judgment for petitioner, are all properly before this Court, and this Court has a plain duty to decide all matters relating to these issues.

B. The Proof of Railroad Negligence. (PRB. 20.)

Petitioner's novel theory of the case and his admissions with respect to it have already been discussed at pp. 2 *et seq.* of this brief and require no further comment here. However, petitioner's citation of *Salem v. United States Lines*, 370 U. S. 31 (1962), (PRB 20-1), makes discussion of that case necessary.

Petitioner's reference to the *Salem* case is by way of attempted justification of his argument that expert entomological testimony was unnecessary to permit the jury to reach the allegedly "self-evident conclusion" that respondent's property conditions were "capable of producing disease." (PRB 20-1.) In that case, it was held that the testimony of a naval architect was not necessary to permit the jury to conclude that safety devices should have been installed adjacent to a ladder leading to a crow's-nest from which a seaman fell when he lost his balance. The rule applicable to such cases was stated by this Court to be that expert testimony is not necessary "if all the primary facts can be accurately and intelligently described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation." (370 U. S. at 35.)

But if, as petitioner now contends, no expert testimony was necessary to show either that *biting* insects would be attracted by the stagnant pool or that some means of disease transmission other than an insect was possible, how could the jury rationally conclude either that the insect which bit petitioner was present because of the pool, or that the pool was otherwise a hazard to the health of employees? A vital element of petitioner's theory of liability is that the biting insect was the "transmittal agency" (PB 29) of his disease, *i.e.*, that the disease was introduced into his body *by an insect*, and not by other means. Unlike the *Salem* case, where *no* expert testimony was received from any source, the record in this case contains the unrebutted testimony of respondent's expert entomologist, who testified that no insect of the size described by petitioner would have been attracted to respondent's property, and that the insects which would be so attracted "don't sting and * * * don't bite." (R. 380-1.) Furthermore, it was the uncontradicted medical testimony of Dr. Davis that the stagnant pool and contents would contain *no* micro-organisms not continuously present on all human beings; that large numbers of such organisms do *not* increase the likelihood of transmission of infection to humans; and that all of them have in any event been ruled out as the cause of petitioner's illness. (R. 433-6.) As a result, even if insects *were* attracted by petitioner's property conditions, the uncontradicted evidence is that they would still not have constituted a health hazard to anyone.

This case is thus in the posture that the Court in the *Salem* case foresaw when it suggested that "if there was a reason hidden from the ordinary mind" why safety devices were impracticable, "those facts called upon the defendant to make that reason known." (370 U. S. at 37.) Here, respondent did make known that the facts with regard to

insect life and disease transmission are not what the "ordinary mind" may suppose. The rule of the *Salem* case therefore does not apply.

C. The Special Verdict. (PRB 23.)

In a tortured effort to divert this Court's attention from the jury's special findings on the subject of foreseeability, petitioner at pages 23-4 of his brief asserts that the interpretation of the special verdict gives rise to a question of Ohio procedural law upon which this Court cannot rule. It has already been observed in Section A of the Argument in this brief that FELA cases involve *federal* rights. It is therefore self-evident that the effect to be given a special verdict is a federal question, and this Court has in effect so held in one of the cases cited by petitioner, *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360 (1957), PRB 24. Petitioner's argument does, however, require some further comment.

Under Ohio procedure, the trial court is empowered to submit a case to the jury in the form of a special verdict, with questions being drawn up by the court with respect to "each determinative issue." (Ohio Revised Code § 2315.15.) Such determinative issues, however, must be "issues of fact." (Ohio Revised Code § 2311.04.) Federal procedure is identical. Rule 49(a) of the Federal Rules of Civil Procedure states in part that "The court may require a jury to return only a special verdict in the form of a special written finding *upon each issue of fact.*" (Emphasis supplied.) In the event the Ohio courts were to hold, as contended by petitioner, that only mixed questions of fact and law could be submitted to FELA juries under Ohio practice, then the rights of FELA litigants to have their cases decided pursuant to the unmixed *factual* findings of

a federal special verdict would plainly be circumvented under the name of local practice, a result not tolerable under the decisions of this Court. *Brown v. Western Railway of Alabama*, 338 U. S. 294 (1949). Hence, inasmuch as the questions with respect to foreseeability would clearly be proper under Rule 49(a),* they must plainly be accepted as a valid and subsisting part of the jury's findings.

Petitioner cites and quotes from *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355 (1962) and quotes from it (PRB 24) a passage to the effect that where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way, and that it is improper to "search for one possible view of the case" which will make the findings inconsistent. Otherwise, a collision with the Seventh Amendment results. *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360 (1957). But although petitioner pays lip service to these rules, he overlooks their application to the facts of this case, and strives, instead, to have this Court entirely disregard, rather than give effect to, the jury's findings of no foreseeability.

In the light of the instructions given to the jury in this case when the special verdict was submitted, it is plain that there is only one view of the case under which effect can be given to *all* of the jury's findings, reconciling each with the others. In its charge, the Court instructed the jury extensively on the general subject of foreseeability both in writing (R. 518-20) and orally (R. 537, 538 following Question 20), but the single and only definition

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* See, *e.g.*, *Green v. American Tobacco Co.*, 5th Cir., 304 F. 2d 70, in which a negative special finding on foreseeability was made the basis of a judgment for defendant in a diversity negligence case.

of the term "negligence" which was given was the following:

> "Negligence is sometimes said to be a failure to observe for the protection of the rights of others that degree of care, precaution, and vigilance which the circumstances justly demand, and sometimes, in other words, it is said that negligence is the failure to observe ordinary care, and ordinary care is that degree of care which people of ordinary prudence and sagacity use under the same or similar circumstances. What would ordinarily prudent persons have done under like circumstances?" (R. 538.)

Study of the forgoing instruction immediately discloses that nothing was said which informed the jury that a finding of foreseeability (*i.e.*, an affirmative answer to Question 20) was legally necessary to a finding of negligence. Instead, the Court's definition of "negligence" was couched in vague general terms, such as "care," "prudence" and "sagacity."

In the context of these instructions, the jury could well have concluded that the property conditions which it described in answer to Question 17 (stagnant water, dead pigeons, rats, bugs and vermin) might constitute "negligence," since even though no mishap or injury could be foreseen therefrom, "care," "prudence" and "sagacity," the operative adjectives of the definition, might nonetheless seem to justify removal of the stagnant pool and contents in order to give respondent's employees a cleaner, more attractive and pleasanter place in which to work.

Petitioner has not suggested any factual or legal theories, and has cited no authority, under which the findings of no foreseeability can otherwise be harmonized with the supposed finding of "negligence," and the interpretation here suggested is the only one which gives effect to the entire verdict considered as a whole. Thus, unless

this Court is prepared to "search for one possible view of the case which will make the jury's findings inconsistent" (369 U. S. at 364), to search for one possible view which will favor petitioner, and to disregard entirely an indispensable finding favorable to respondent, the final judgment for respondent must be affirmed.

D. Remand to the Ohio Supreme Court. (PRB 26.)

Respondent has some difficulty in reconciling the bold face caption on page 26 of petitioner's reply brief with the argument which follows. If "there is no reason contrary" to a remand, as stated in the caption, then presumably petitioner would not oppose one. If, however, as the argument seems to suggest, respondent has exhausted its remedies, then a remand would not be appropriate. If the latter is petitioner's true contention, then it suffices to say that whether or not the Ohio Supreme Court now has the power to hear the case on respondent's cross motion to certify (R. 636) is plainly a question of Ohio law which the Ohio Supreme Court alone should determine. Thus, in either event, a remand will be appropriate should the Court resolve all other questions in petitioner's favor.

CONCLUSION.

If, as petitioner now apparently concedes, the insects attracted by respondent's property conditions were all of a type harmless to man, then petitioner's case must fail, either because the biting insect must in that case have been present for reasons unconnected with the stagnant pool, or because there would then be no evidence whatever of any means of transmission of disease from the pool to humans. If, on the contrary, petitioner's theory is that respondent's property conditions placed it upon notice that *harmful* insects would be attracted, then petitioner must fail because of his admitted and unexplained failure to introduce competent proof from a qualified entomologist to overcome the unrebutted testimony to the contrary of Dr. Stearns. In either case, it is plain that the final judgment for respondent must be affirmed.

Respectfully submitted,

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